No. 01-1184-CFY Title: United States, Petitioner
v.
Francisco Jimenez Recio and Adrian Lopez-Meza

Docketed: February 14, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jan 17 2002	Application (01A528) to extend the time to file a petition for a writ of certiorari from January 28, 2002 to February 27, 2002, submitted to Justice O'Connor.
	Jan 18 2002	Application (01A528) granted by Justice O'Connor extending the time to file until February 27, 2002.
	Feb 14 2002	Petition for writ of certiorari filed. (Response due April 15, 2002)
	Mar 17 2002	Waiver of right of respondent Francisco Jimenez Recio to respond filed.
	Mar 19 2002	Order extending time to file response to petition until April 15, 2002.
	Mar 19 2002	This extension of time is granted for all respondents.
	Apr 15 2002	Brief of respondent Adrian Lopez-Meza in opposition filed.
	Apr 29 2002	Brief of respondent Francisco Jimenez Recio in opposition filed.
	Apr 29 2002	Motion of respondent for leave to proceed in forma pauperis filed.
	May 2 2002	Reply brief of petitioner United States filed.
	May 7 2002	DISTRIBUTED for Conference of May 23, 2002
	May 28 2002	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	May 28 2002	Petition GRANTED. SET FOR ARGUMENT November 12, 2002. **********
	Jun 6 2002	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Jun 17 2002	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Jul 10 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 19, 1002.
	Jul 19 2002	Brief of petitioner United States filed.
	Jul 19 2002	Brief amici curiae of American Center for Law & Justice, et al. filed.
	Aug 16 2002	Brief of respondent Francisco Jimenez Recio filed.
	Aug 21 2002	Brief of respondent Adrian Lopez-Meza filed.
	Sep 17 2002	Record filed.
	Sep 24 2002	CIRCULATED.
	Oct 4 2002	Reply brief of petitioner United States filed.
	Nov 12 2002	ARGUED.

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND
ADRIAN LOPEZ-MEZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a conspiracy ends as a matter of law when the government frustrates its objective.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

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FRANCISCO JIMENEZ RECIO AND ADRIAN LOPEZ-MEZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 258 F.3d 1069.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2000, and amended on July 31, 2001. A petition for rehearing was denied on October 30, 2001 (App., *infra*, 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, both respondents were convicted in the United States District Court for the District of Idaho of conspiring to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(A), and 21 U.S.C. 846. Lopez-Meza C.A. E.R. 1-2. Respondent Recio was sentenced to 126 months' imprisonment, to be followed by five years' supervised release. Recio C.A. E.R. 7-8. Respondent Lopez-Meza was sentenced to 132 months' imprisonment, to be followed by five years' supervised release. Lopez-Meza C.A. E.R. 67-68. The court of appeals reversed respondents' conspiracy convictions for insufficient evidence. App., *infra*, 1a-10a.

1. On November 18, 1997, at approximately 1 a.m., a Nevada police officer stopped a northbound flatbed truck occupied by Manuel Sotelo and Ramiro Arce. The police seized 369 pounds of marijuana and 14.8 pounds of cocaine. The drugs were worth between $10 and $12 million. Sotelo and Arce claimed ignorance of the drugs but said they had agreed to drive the truck to Nampa, Idaho, where they were supposed to leave the truck parked at the Karcher Mall. App., *infra*, 2a, 4a, 19a, 23a.

Arce decided to cooperate, and government agents set up a sting. The following day the government transported the truck to Idaho and parked it at the Karcher Mall. Arce called an Arizona pager number. When someone returned the page, Arce mentioned the truck's location to the caller, who stated that he would "call a muchacho to come and get the truck." App., *infra*, 2a, 5a, 19a.

About three hours later, respondents drove into the mall parking lot in a blue car and pulled up to the truck.

Recio got out of the car and into the truck. Both Recio and Lopez-Meza drove west on different back roads. The agents ultimately decided to stop the vehicles, and they arrested Recio and Lopez-Meza. App., *infra*, 2a, 4a, 19a.

Recio and Lopez-Meza each made false statements to the agents to explain their actions. App., *infra*, 4a. Recio denied ever being dropped off at the Karcher Mall. He said he had been shopping and that he ran into a man who offered him $250 to drive the truck to Recio's house, where the man would pick it up later. Recio explained that he decided to take back roads instead of a much more direct route because "[he] just like[d] to drive in the country." *Id.* at 22a. Recio was carrying a pager, a phone card, and a "'non-owner' driver's insurance" policy, which covers the named insured for operation of a vehicle owned by another. *Id.* at 4a, 5a. Recio had renewed the policy shortly before the seizure. *Id.* at 5a.

When the police stopped Lopez-Meza, they smelled marijuana in the car. App., *infra*, 19a. The police recovered two pagers and two phone cards from him. *Id.* at 4a, 5a, 27a. Lopez-Meza told the police that he had been "out driving around" and that he was going to see his girlfriend, whose last name and address he could not recall. *Id.* at 26a-27a.

2. On January 16, 1998, a federal grand jury returned a superseding indictment charging Recio and Lopez-Meza with conspiracy to possess with intent to distribute cocaine and marijuana and possession of cocaine and marijuana with the intent to distribute them. App., *infra*, 69a-70a. They were each found guilty on both counts. *Id.* at 60a. Respondents filed post-trial motions for judgment of acquittal in which they argued that their conspiracy convictions were

invalid under *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998). See App., *infra*, 59a-68a.

In *Cruz*, the government prosecuted a conspiracy charge against Billy Cruz, a drug courier who agreed to deliver 210.7 grams of methamphetamine after the original courier, Peter Balajadia, had, unbeknownst to Cruz, been arrested with the drugs. The Ninth Circuit held that Cruz was innocent of the charged conspiracy because he joined it *after* the government had seized the drugs, even though Cruz, the seller, and the buyer were all unaware of the seizure. The *Cruz* court reasoned that "it was factually impossible for Cruz to have been a member of th[e] conspiracy because Balajadia and [his companion] had been arrested and the drugs seized before he wa even invited to join," 127 F.3d at 795 n.4, and that the seizure had "terminat[ed] the conspiracy," *id.* at 794 n.1.

The district court in this case denied respondents' motion for judgment of acquittal, holding that there was sufficient evidence that Recio and Lopez-Meza had joined the conspiracy before the drugs were seized. The district court nevertheless decided to grant respondents a new trial on the conspiracy count, because no *Cruz* instruction was given, creating a risk that the jury found respondents guilty based solely on their post-seizure actions.[1] App., *infra*, 64a. The jury found respondents guilty of conspiracy at the second trial.

[1] The district court granted Lopez-Meza a new trial on the possession count as well, App., *infra*, 67a, but the government dismissed that count before the second trial. See *id.* at 10a n.6. Recio, who was driving the drug-laden truck, did not file a motion for judgment of acquittal on the possession count. *Id.* at 60a n.1.

3. a. A divided panel of the Ninth Circuit reversed. App., *infra*, 1a-10a. The majority held that the evidence presented at the second trial was insufficient. *Id.* at 10a. Relying on *Cruz*, the court viewed the question before it as "whether any rational jury could find, beyond a reasonable doubt, that [respondents] were involved in the conspiracy prior to the initial seizure of the drugs on November 18, 1998." *Id.* at 3a. The majority was unable to find any evidence that unequivocally demonstrated respondents' *pre*-seizure participation in the conspiracy. For example, the majority dismissed as irrelevant the evidence that respondents lied to the police officers upon their arrest, because their false statements "provide[] no basis for concluding that [respondents] were involved in the conspiracy *beforehand*." *Id.* at 4a (emphasis added); see also *ibid.* ("Nothing [respondents] said or did on November 18, 1998 directly links them to the pre-seizure conspiracy."). The majority also found respondents' possession of pagers irrelevant to the timing of their involvement, reasoning that

> one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.

Id. at 5a. The panel majority concluded that the evidence suggested that respondents "were simply drivers hired at the last minute." *Id.* at 5a-6a.

The panel majority rejected the government's contention that respondents had participated in other goals of the conspiracy involving other drug shipments, even if they became involved in the November 18 shipment

only after the government had seized the drugs. The court reasoned that "the limited role [respondents] played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads." App., *infra*, 6a. The majority observed that "[t]he strongest evidence" of respondents' involvement in a broader conspiracy was Recio's multiple receipts for expired non-owner insurance policies, from which it could be inferred that Recio "regularly drove drug trucks for the conspiracy." *Id.* at 7a. But the majority "remain[ed] unpersuaded," because the "insurance can also be accounted for by alternative explanations," including the possibility that Recio worked as a driver for legitimate businesses. *Ibid.* The majority was also unpersuaded by the evidence indicating that Lopez-Meza lived at Nu Acres, the delivery point for the drugs, and the evidence of his links to his uncle Jose Meza, who was implicated in the conspiracy and lived at Nu Acres also. The majority reasoned that Lopez-Meza's "presence [at Nu Acres] and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute." *Id.* at 8a.

b. Judge Gould dissented. He stated his disagreement with the court's prior holding in *Cruz*:

> [F]or the reasons stated by Judge Hall in dissent in *Cruz*, I believe *Cruz* totally inconsistent with long established and appropriate principles of the law of conspiracy. Though we are now bound by *Cruz*, and the district court was correct to apply it, I believe that it is an ill-advised precedent that our court should overrule en banc at the earliest opportunity.

App., *infra*, 21a n.2. Nonetheless, applying *Cruz*'s rule that a defendant cannot join a conspiracy after the seizure of the drugs in question, Judge Gould concluded that there was "unmistakably more than sufficient evidence in the second trial" linking defendants to a conspiracy *before* police officers seized the drugs on November 18, 1997. *Id.* at 18a; see *id.* at 21a-28a. Judge Gould also concluded that the government presented sufficient evidence of respondents' involvement in a larger conspiracy involving more loads than the one seized on November 18, based on their "possession and use of sophisticated drug-trafficking communication devices" and "the quantity, quality and value of the drugs seized." *Id.* at 34a; see *id.* at 29a-34a.

c. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 45a-46a. Judge O'Scannlain, joined by eight other active circuit judges, dissented from that decision. *Id.* at 46a-58a. Judge Hall, a senior judge who authored the dissenting opinion in *Cruz*, stated that she also "agree[d]" with Judge O'Scannlain's dissent. *Id.* at 58a. Judge O'Scannlain traced the court's mistake to its decision in *Cruz*:

> By failing to rehear *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2001), en banc, we let stand the aberration wrought by *Cruz* now compounded by *Recio*. In so doing, we erect serious impediments to legitimate law enforcement efforts to combat drug trafficking by mandating the exclusion of relevant, probative, and, indeed, overwhelming evidence of guilt. We also perpetuate conflict with our sister circuits and, in my view, ignore black letter principles of conspiracy law set out for us by the U.S. Supreme Court.

Id. at 46a. Judge O'Scannlain explained that, "[i]n holding that a conspiracy endures only as long as its ultimate goal remains objectively achievable, *Cruz* imports a defense of factual impossibility into the law of conspiracy in direct conflict with the long-standing, black letter principle that impossibility is not a defense to a conspiracy charge." *Id.* at 51a.

Judge O'Scannlain stated (App., *infra*, 51a-52a) that the court of appeals' recognition of factual impossibility as a defense to conspiracy conflicts with decisions of this Court, including *Salinas* v. *United States*, 522 U.S. 52 (1997), in which the Court had explained that "[a] person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense[,]" because "the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* at 64, 65. He also stated that the rule of *Cruz* and this case conflicts with decisions of other courts of appeals, including the First Circuit's decision in *United States* v. *Belardo-Quiñones*, 71 F.3d 941, 944 (1995). See App., *infra*, 52a. In Judge O'Scannlain's view, "the paradoxical effect of *Cruz* and *Recio* is to exclude evidence of guilt following successful and entirely *legitimate* intervention by law enforcement agents." *Id.* at 50a. Applying the "fundamental principle" that the duration of a conspiracy is determined by "'the scope of the conspiratorial agreement' itself," *id.* at 57a (quoting *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957)), Judge O'Scannlain found that respondents were clearly guilty of the charged conspiracy, because the agreement to transport the drugs, to which they were a party, survived the government's seizing the drugs, *ibid.*

REASONS FOR GRANTING THE PETITION

In *United States* v. *Cruz*, 127 F.3d 791 (1997), cert. denied, 522 U.S. 1097 (1998), the Ninth Circuit held that a conspiracy automatically ends when law enforcement intervenes and frustrates the conspiracy's objective. Applying that rule, the court of appeals in this case reversed respondents' conspiracy convictions despite overwhelming evidence of their agreement to transport 369 pounds of marijuana and 14.8 pounds of cocaine and their commission of acts in furtherance of that agreement. The rule of law announced in *Cruz* and applied here conflicts with black-letter principles of conspiracy law consistently followed by this Court. It also conflicts with the decisions of other circuits rejecting factual impossibility as a defense to conspiracy liability. The conflict merits this Court's review because the Ninth Circuit's rule exonerates culpable defendants and needlessly complicates the prosecution of conspiracy cases. Moreover, it discourages legitimate law enforcement methods that can be of vital importance not only in drug cases, but also in violent crime, terrorism, and other contexts in which prosecution of the conspirators and frustration of their goals are both crucial objectives.

1. The Ninth Circuit in *Cruz* held that, when a conspiracy's objectives have become factually impossible, the conspiracy necessarily terminates. See, *e.g.*, 127 F.3d at 795 & n.4 ("Here, the conspiracy * * * had been terminated by the government's seizure of the methamphetamine before Cruz became involved. * * * [I]t was factually impossible for Cruz to have been a member of th[e] conspiracy because [two conspirators] had been arrested and the drugs seized before he was even invited to join."). By holding that a conspiracy

terminates automatically when the government frustrates its objective, the *Cruz* court created a rule at odds with the fundamental principle that the duration and scope of a conspiracy is defined by the agreement, not by the attainability of its goals. See App., *infra*, 51a-53a (O'Scannlain, J., dissenting from denial of rehearing en banc).

As this Court explained in *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957), it is the conspiratorial agreement that "determines * * * the duration of the conspiracy." See *United States* v. *Shabani*, 513 U.S. 10, 16 (1994) ("[T]he criminal agreement itself is the *actus reus*."); *United States* v. *Felix*, 503 U.S. 378, 389-390 (1992) ("[T]he 'essence' of a conspiracy offense is in the agreement or confederation to commit a crime.") (internal quotation marks omitted); *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."). The conspiracy endures as long as the agreement endures. The impossibility of achieving the conspiratorial object is irrelevant; "a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas* v. *United States*, 522 U.S. 52, 65 (1997).

The *Cruz/Recio* rule cannot be reconciled with this Court's rejection of the factual impossibility defense in *Osborn* v. *United States*, 385 U.S. 323 (1966). The defendant there contended that his endeavor to bribe a juror, in violation of 18 U.S.C. 1503, was "impossible of accomplishment," because the individual whom he enlisted to contact the juror was cooperating with the Federal Bureau of Investigation (FBI). This Court rejected the defendant's contention, observing that

"[w]hatever continuing validity the doctrine of 'impossibility,' with all its subtleties, may continue to have in the law of criminal attempt, that body of law is inapplicable here." 385 U.S. at 332, 333 (footnote omitted). The Court explained that, by proscribing an "endeavor" to obstruct justice, the statute "is not directed at success in corrupting a juror." *Id.* at 333 (quoting *United States* v. *Russell*, 255 U.S. 138, 143 (1921)). Because laws prohibiting conspiracy are similarly not directed at the successful commission of the crime, see, *e.g.*, *Salinas*, 522 U.S. at 64 ("A person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense."); *Braverman* v. *United States*, 317 U.S. 49, 53 (1942), the *Osborn* rationale for rejecting the impossibility defense applies equally to conspiracy cases such as *Cruz* and this case.

The *Cruz* court justified its application of factual impossibility not by reference to the defendant's culpability under traditional conspiracy law, but because "liability for the original conspiracy on the basis posited by the government could be endless." 127 F.3d at 795. The court speculated that "[i]t is not difficult to picture [the conspirator who had been arrested with the drugs] sitting in the Honolulu Airport Police Station with a copy of the * * * telephone directory in hand, following the detectives' instructions to call all of his acquaintances * * * to come to Honolulu to help him." *Id.* at 795 n.3. That concern relates not to whether a defendant may be guilty of conspiracy when the crime may, in fact, be impossible to accomplish. Rather, it relates to misgivings about law enforcement techniques involving "sting" operations. This Court, however, has squarely rejected expanding the entrapment defense to exonerate defendants in cases where the traditional

requirements of that defense—government inducement and lack of predisposition—are missing. See *United States* v. *Russell*, 411 U.S. 423 (1973). The Court in *Russell* explained that

> the defense of entrapment * * * was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.

Id. at 435. The *Cruz* court exercised precisely the kind of "veto" that *Russell* prohibits, by exonerating respondents in order to place limits on what it believed would be improper government law enforcement techniques.

2. *Cruz* and the decision in this case create a circuit conflict. The conflict with the First Circuit is particularly sharp, because that circuit rejected the factual impossibility defense to a conspiracy charge in circumstances directly analogous to those presented in *Cruz* and this case. In *United States* v. *Belardo-Quiñones*, 71 F.3d 941 (1995), the First Circuit held that the defendant could not defend against a drug importation conspiracy charge by claiming that Venezuelan authorities had seized the drug-laden boat before he joined in the scheme. The court explained that "a culpable conspiracy may exist even though, because of the misapprehension of the conspirators as to certain facts, the substantive crime which is the object of the conspiracy may be impossible to commit." *Id.* at 944. That is so because "[e]ven if intervening events had made the accomplishment of the criminal purpose impossible[,] all

the elements of a criminal conspiracy were present." *Ibid.* Relying on authority that a conspiracy may exist even though its object could never have been achieved, the court explained that "[t]here is no basis for making a distinction between those who start a conspiracy that is impossible from the beginning and one who joins in a conspiracy that has become impossible due to intervening events unknown to the conspirators." *Ibid.* The court concluded that a conspiracy continues as long as some of the conspirators "are continuing to actively pursue the original criminal goal." *Ibid.* Accord *United States* v. *Giry*, 818 F.2d 120, 125 (1st Cir.), cert. denied, 484 U.S. 855 (1987).

The Ninth Circuit's embrace of factual impossibility as a defense to conspiracy liability is also at odds with decisions of the other courts of appeals. See, *e.g.*, *United States* v. *Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("[W]e are persuaded by the views of our district courts, and by the decisions of our sister circuits, that the impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *United States* v. *Wallace*, 85 F.3d 1063, 1068 (2d Cir. 1996) (affirming conviction for conspiracy to defraud bank, even though bank was never at risk of losing anything, because "[t]hat the conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant"); *United States* v. *LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989) (affirming conviction for conspiracy to steal U.S. bonds, despite absence of proof that bonds were stolen, because "defendants can be found guilty of criminal conspiracy even though the object of their conspiracy is unattainable from the very beginning"); *United States* v. *Petit*, 841 F.2d 1546, 1549-1550 (11th Cir.) (affirming conviction for conspiracy to receive stolen goods despite the fact that goods at issue had

never been stolen), cert. denied, 487 U.S. 1237 (1988); *United States* v. *Seelig*, 498 F.2d 109, 112 (5th Cir. 1974) (impossibility of achieving objective of Section 846 conspiracy not a defense); see also *United States* v. *Jones*, 765 F.2d 996, 1002 (11th Cir. 1985) (stating that "sheer impossibility is no defense" to drug conspiracy charge).[2] As a leading treatise summarizes, "the conspiracy cases have usually gone the simple route of holding that impossibility of any kind is not a defense." 2 Wayne R. LaFave & Austin Scott, Jr., *Substantive Criminal Law* § 6.5, at 92 (1986) (citing cases).

3. The court of appeals' decisions in *Cruz* and this case undermine the effective administration of justice. As Judge O'Scannlain demonstrates (App., *infra*, 49a-50a), the *Cruz/Recio* rule requires courts and juries to conduct an exacting review of the evidence to determine whether the defendant's participation in an agreement to distribute drugs predated or postdated

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[2] The courts of appeals have similarly held that impossibility is not a defense to attempt charges under 21 U.S.C. 846. See *United States* v. *Sobrilski*, 127 F.3d 669, 674 (8th Cir. 1997), cert. denied, 522 U.S. 1134, 1152 (1998); *United States* v. *Pennell*, 737 F.2d 521, 525 (6th Cir. 1984) (same), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Everett*, 700 F.2d 900, 904 (3d Cir. 1983) ("We are convinced that Congress intended to eliminate the defense of impossibility when it enacted section 846."). State courts have similarly concluded that factual impossibility is not a defense to conspiracy charges. See, *e.g.*, *State* v. *Houchin*, 765 P.2d 178, 179-180 (Mont. 1988) (factual impossibility, which exists "when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators," not a defense to conspiracy charge); *State* v. *Moretti*, 244 A.2d 499, 503-504 (N.J.) ("We hold that when the consequences sought by a defendant are forbidden by the law as criminal, it is no defense that the defendant could not succeed in reaching his goal because of circumstances unknown to him."), cert. denied, 393 U.S. 952 (1968).

the government's seizure of the drugs—a determination that has nothing to do with the defendant's culpability. The rule led the majority in this case to reverse respondents' convictions despite the panel's recognition that they had undoubtedly agreed to participate in the distribution of drugs. For example, the court accepted that respondents' false statements at the time of arrest "point[] * * * to knowledge that they were involved in illicit activity at that time." *Id.* at 4a. The court also accepted that respondents' possession of pagers was incriminating when it noted that "one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade" and that "the main conspirators would want to stay in especially close communication with their drivers." *Id.* at 5a. See also *id.* at 5a-6a (accepting evidence "that [respondents] were simply drivers hired at the last minute"). The panel held, however, that because the evidence of the false statements "provides no basis for concluding that they were involved in the conspiracy *beforehand*," *id.* at 4a (emphasis added), and their possession of the pagers was not evidence of "*pre-seizure* involvement in the conspiracy," *id.* at 5a (emphasis added), the evidence did not support their conviction.

Although the court of appeals in this case did not address the possibility that respondents may be liable for a post-seizure conspiracy, the Ninth Circuit in *Cruz* suggested that the defendant there, though innocent of the charged conspiracy, "at most, * * * may have been a member of a *new* conspiracy" formed after the seizure. 127 F.3d at 795 n.4. In his dissent from the denial of rehearing en banc, however, Judge O'Scannlain doubted that any liability for a post-seizure conspiracy would be possible under the logic for *Cruz*; if

the government's seizure of the drugs terminated the original conspiracy, the government's seizure would also arguably preclude the formation of a new conspiracy to distribute the same drugs. App., *infra*, 53a-56a (opinion of O'Scannlain, J.).

If the *Cruz/Recio* rule precludes all conspiracy liability for defendants in respondents' position, the rule would have serious and deleterious consequences. It would discourage investigators from engaging in operations that ferret out criminal operations and that prevent conspiracies from achieving their objectives for fear that such action will compromise the government's ability to prosecute all of the guilty participants. In the analogous context of rejecting a claim that impossibility is a defense to an attempt charge under Section 846, the Third Circuit has explained:

> Allowing the [impossibility] defense [under Section 846] would also gut law enforcement efforts to infiltrate drug supply chains. The government goes undercover not only as a purchaser, as in the instant case, but as seller, or as middleman. * * * Given the horrendous difficulties confronted by law enforcement authorities in dealing effectively with the burgeoning drug traffic, it is difficult to assume that Congress intended to deprive them of flexibility adequate to counter effectively such criminal activity.

United States v. *Everett*, 700 F.2d 900, 907-908 n.16 (1983) (internal quotation marks and citations omitted). Moreover, the vital need for undercover government efforts both to apprehend conspirators and to prevent their planned offenses from actually occurring extends far beyond drug cases; similar legitimate law enforcement tactics are crucial in violent crime, terrorism and other contexts.

Even if the *Cruz/Recio* rule would permit those in respondents' position to be held liable for a post-seizure conspiracy, it would nonetheless cause unnecessary complications in the framing of indictments. A prosecutor in a case like this would have to decide whether the evidence supported charging a single conspiracy spanning the pre- and post-seizure periods. Charging a single conspiracy would be in the interest of logic and judicial economy, but it would require the prosecutor to determine whether, for each defendant, the evidence would ultimately be held sufficient under the Ninth Circuit's exacting standards to support a conclusion of pre-seizure participation in the conspiracy. A mistaken determination by the prosecutor on that point would risk the result obtained in *Cruz* and this case: acquittal for at least some defendants. If the prosecutor instead chose to charge multiple conspiracies, one ending with the seizure and the second beginning thereafter, other complications would arise. Such charges may elicit double jeopardy and multiplicity challenges by the defendants who participated both before and after the government frustrated the "original" conspiracy's objective. The charges may also elicit challenges to the joinder in a single indictment of the pre- and post-seizure conspirators, see Fed. R. Crim. P. 8, and to the conduct of a joint trial involving all defendants, see Fed. R. Crim. P. 14.

The *Cruz/Recio* regime thus threatens to entangle conspiracy prosecutions in complex challenges to the indictment, to the admissibility and sufficiency of evidence, and to jury instructions. All of those consequences arise from the *Cruz*-imposed centrality of the *seizure date* to the proof of the relevant conspiracy—a

fact that is unrelated to the defendants' culpability under traditional conspiracy law. In cases where those challenges are successful, as they were here and in *Cruz*, guilty defendants may escape conviction and punishment. The conflict that the Ninth Circuit has created with this Court's decisions and those of several circuits merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-30135, 99-30145
D.C. No. CR-97-00103-BLW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANCISCO JIMENEZ RECIO, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ADRIAN LOPEZ-MEZA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding.

Argued and Submitted: March 6, 2000
Filed: Sept. 27, 2000
Amended: July 31, 2001

Before: JAMES R. BROWNING, B. FLETCHER, and RONALD M. GOULD, Circuit Judges.

Opinion by Judge JAMES R. BROWNING; Concurrence by Judge BETTY B. FLETCHER; Dissent by Judge RONALD M. GOULD

ORDER AND AMENDED OPINION

JAMES R. BROWNING, Circuit Judge:

ORDER

This court's opinion and the accompanying dissent filed September 27, 2000, are hereby amended. The amended opinions are filed simultaneously with this order, along with a separate concurrence by Judge B. Fletcher.

OPINION

Francisco Jimenez Recio and Adrian Lopez-Meza appeal their convictions of conspiracy to possess with intent to distribute a controlled substance. Jimenez Recio also appeals his conviction for possession with intent to distribute.

Jimenez Recio and Lopez-Meza were arrested for their part in transporting a truck load of marijuana and cocaine, valued at an estimated $12 million. The original driver of the truck had been arrested earlier that day, along with a companion, Arce. Arce agreed to cooperate with the police and contacted other members of the drug conspiracy to have someone sent to retrieve the truck, which had been parked at a mall in Nampa, Idaho. Jimenez Recio and Lopez-Meza appeared at the mall a few hours later. They left separately, with Jimenez Recio driving the truck and Lopez-Meza driving the car that had brought them.

Both argue the district court should have granted their motion for judgment of acquittal after both the first and second trials under *United States v. Cruz*, 127 F.3d 791, 795 (9th Cir. 1997), in which we ruled that a

defendant could not be charged with conspiracy to distribute illegal drugs when the defendant was brought into the drug scheme only after law enforcement authorities had already intervened, and defendant's involvement was prompted by the intervention.

In *Cruz*, two individuals on their way to Guam to deliver methamphetamine were arrested, and their drugs confiscated. *Id.* at 794. Because Cruz was lured into taking over the delivery through a government "sting," we held the evidence was insufficient for a rational jury to have found, beyond a reasonable doubt, that Cruz's involvement was part of the original, pre-seizure smuggling conspiracy. *Id.* at 796.

Viewing the evidence in the light most favorable to the government as we must, *see United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999), we must determine whether any rational jury could find, beyond a reasonable doubt, that Jimenez Recio and Lopez-Meza were involved in the conspiracy prior to the initial seizure of the drugs on November 18, 1998. We focus on the evidence presented at their second trial. [1]

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[1] The second trial included substantially all the evidence at the first trial as well as additional testimony analyzing telephone records and the opinion of a government expert that the conspiracy was a large operation. Because we conclude this evidence was insufficient, the same would apply *a fortiori* to the evidence at the first trial. In fact, it is unclear whether we could properly review the sufficiency of the evidence at the first trial. *Cf. United States v. Sarkisian*, 197 F.3d 966, 985 n. 7 (9th Cir. 1999) (reserving the question of whether the sufficiency of evidence in an initial mistrial is reviewable on appeal from conviction at second trial); *compare United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984) (suggesting in dicta evidence would be reviewable), *with*

The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court stated that "Lopez's and [Jimenez Recio]'s words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jimenez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using pre-paid calling cards.

This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jimenez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the pre-paid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls on Lopez-Meza's card *were* made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations. The phone numbers called are not probative of a conspiracy: The Idaho calls were to "Nu Acres," where the drugs were apparently destined, but the number called was a communal telephone at a migrant camp where Lopez-Meza lived. The Chicago calls were all to different telephone numbers.

United States v. Kimberlin, 805 F.2d 210, 231 (7th Cir. 1986) (suggesting the contrary).

The other evidence of Defendants' pre-seizure involvement in the conspiracy is also insufficient. The government argues that Jimenez Recio's renewal of his "non-owner" driver's insurance shortly before his arrest demonstrates his anticipation of driving the drug-laden truck; yet, the government expert testified that Jimenez Recio would not have been involved in the delivery the following day absent the government "sting," and thus could not have anticipated being called on to drive. As for the pagers they carried, one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.[2]

On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers

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[2] The dissent draws from this and other evidence a series of inferences that reasonable jurors could reach. Review of the evidence in the light most favorable to the government must still meet the requirement of proof beyond a reasonable doubt. Where, as here, the evidence is inherently ambiguous, it is not enough that a jury could reasonably reach certain inferences if reasonable doubt as to a different conclusion cannot be dismissed.

hired at the last minute.[3] Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jimenez Recio retrieved the truck—the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendants were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.

The government also relied on an additional broader conspiracy theory to circumvent *Cruz* on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. *Cf. United States v. Umagat*, 998 F.2d 770, 773-774 (9th Cir. 1993) (minor role of defendants in single transaction does not permit imputed liability for the broader

[3] The government expert credited Arce's testimony that Arce had been similarly recruited at the last minute. Therefore, the general inference drawn by the dissent "that co-conspirators would not entrust such a large value of drugs to a person not integrally involved in the conspiracy" would seem less applicable to this conspiracy. In any case, Lopez-Meza's familial ties to his uncle "Raul," a seemingly central figure in the case, provide an equally plausible explanation for the apparent trust placed in Lopez-Meza (and by extension Jimenez Recio).

conspiracy). Therefore, this theory too hinges on proof of prior involvement.

The strongest evidence that Defendants might be repeat players in drug trafficking were the multiple receipts for expired non-owner insurance policies found on Jimenez Recio. This suggests he habitually drove vehicles he did not own, from which a jury could further infer that Jimenez Recio regularly drove drug trucks for the conspiracy. It is a close question as to whether this inference, in conjunction with the other circumstantial evidence, could suffice to eliminate reasonable doubts among rational jurors as to Jimenez Recio's guilt (and by extension, perhaps Lopez-Meza's as well).

Ultimately, however, we remain unpersuaded. The insurance can also be accounted for by alternative explanations. For example, Jimenez Recio might work as a driver for legitimate businesses. The trafficking conspirators might naturally have turned to such an individual once Sotello was arrested (assuming alternate drivers within the conspiracy were unavailable).[4] Jimenez Recio was also an illegal immigrant. As such, he would be reluctant to testify as to his legitimate work, lest he jeopardize his employers and his own future employment; this could explain the defense's silence on the matter.[5]

[4] Although the record is not clear as to size of the truck in this case, it is described variously as a "flat-bed" or "construction truck," suggesting that it is at least somewhat larger than the average consumer vehicle. If so, the need for a driver with a particular expertise in driving such trucks would be evident.

[5] Testimony from the immigration agent that he had never seen such a policy carried by an illegal immigrant before is irrelevant. The government expert on drug trafficking notably omitted any mention of the insurance as common in that context either. If, as

As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

We need now only address those claims relevant to Jimenez Recio's conviction at the first trial of possession with intent to distribute a controlled substance.

The district court did not err by allowing evidence of the odor of burned marijuana in Lopez-Meza and Jimenez Recio's blue Mazda. The evidence was relevant to the charge that Jimenez Recio possessed marijuana with intent to distribute. *See United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994). One of the primary issues was whether Jimenez Recio knew there were narcotics in the flatbed truck when he and Lopez-Meza retrieved it. The fact that their own car reeked of marijuana makes it more likely that Jimenez Recio was familiar with the odor and knew they were in possession of marijuana.

The district court did not err by denying Defendants' motion for a mistrial based on the prosecutor's reference to a "stash house." Since the government had referred to the Nu Acres residence as the ultimate destination of the drugs without objection, it was not

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the dissent observes "[e]ven drug-trafficking conspirators, it seems, want insurance," the same can be said of illegal immigrants, and for the same reason.

particularly prejudicial for the prosecutor to refer to that residence as a "stash house." Although the prosecutor violated the court's instruction not to use the term, the prosecutor's misconduct does not require reversal since nothing in the record suggests the jury's verdict was affected by its use.

The district court did not abuse its discretion in admitting the expert testimony of Special Agent Hinton. It did not exceed the boundaries set by the district court or by Federal Rules of Evidence Rule 702.

Finally, Jimenez Recio's counsel's failure to move for acquittal on Count Two, possession with intent to distribute, after the first trial constituted ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Ordinarily, we do not reach claims of ineffective assistance of counsel on direct appeal, and only do so in habeas corpus proceedings. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000). However, we review ineffective assistance claims where the record is "sufficiently developed to permit review and determination of the issue" or where "the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *Id.* (quoting *United States v. Robinson*, 967 F.2d 287, 290 (9th Cir. 1992)).

The government's concession in its brief regarding the motion for judgment of acquittal provides such a record: "The Government agrees with the first premise, namely, that had Appellant's trial counsel made the motion for judgment of acquittal as to Count Two, the trial judge would have granted sua sponte the new trial as to both counts, as he did for codefendant Lopez." This concession makes a sufficient record to find

prejudice since all parties agree that Jimenez Recio would have been granted a new trial but for the actions of his counsel. Although the government may not have dismissed the possession with intent to distribute count against Jimenez Recio before the second trial, [6] the fact that Jimenez Recio was denied a new trial constitutes prejudice in its own right.

The conspiracy convictions are reversed and dismissed with prejudice because of insufficient evidence.

AFFIRMED IN PART, REVERSED IN PART.

[6] The circumstances suggest the government dismissed Count Two against Lopez-Meza only to avoid the incongruity of charging both defendants with conspiracy, but only Jimenez Recio with possession, although both basically engaged in the same conduct.

BETTY B. FLETCHER, Circuit Judge, concurring:

I concur in the majority opinion but write separately to make the point that even if the evidence presented at the second trial, when taken in the light most favorable to the government, could (in the view of the dissent) suffice to convict the defendants on the broader conspiracy charge, their convictions should be overturned based on the insufficiency of the evidence at the first trial. At the first trial, the government argued and presented evidence relating solely to the single load conspiracy.[1] It was only after a mistrial was declared that the government argued and presented additional evidence at the second trial relating to the alleged existence of a broader conspiracy. As I explain below, the evidence presented at the first trial was plainly insufficient to support a conspiracy conviction under the single load theory in light of our controlling case law.

As the Supreme Court stated in *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978), "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Although it is evident that the defendants' conspiracy convictions were not final (and hence unreviewable by this court) until after the conclusion of their second trial, *see Richardson v. United States*, 468 U.S. 317, 326 n. 6, 104 S. Ct. 3081, 82 L.Ed.2d 242 (1984), the defendants moved for acquittal in the district court following each trial based on insufficiency of the evidence. Accord-

[1] Indeed, the defendants were indicted for conspiracy based only on this theory.

ngly, although our circuit has yet to decide whether the sufficiency of the evidence at the first trial is reviewable after the second trial's conclusion, *cf. United States v. Sarkisian*, 197 F.3d 966, 985 n. 7 (9th Cir. 1999), I conclude that Jimenez Recio and Lopez-Meza now raise cognizable claims for acquittal based on the insufficiency of the evidence at both their first and second trials.

As the Court stated in *Burks*, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." 437 U.S. at 18, 98 S. Ct. 2141. Otherwise, "the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'" *Id.* at 17, 98 S. Ct. 2141. Indeed, "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16, 98 S. Ct. 2141.

In *Burks*,[2] the Court further held that "[i]t cannot be meaningfully said that a person 'waives' his right to a

[2] *Richardson* did not overrule *Burks* with respect to the ability of an appellate court to review the sufficiency of the evidence at the first trial. *Richardson* held only that the Double Jeopardy Clause does not bar a retrial after the first trial ends in a hung jury. *Richardson*, 468 U.S. at 325-26, 104 S. Ct. 3081. Indeed, the *Richardson* Court took pains to distinguish the procedural posture of that case from the one in *Burks*, and to reconcile the two holdings. *See, e.g., id.* at 324, 104 S. Ct. 3081 ("We are entirely unwilling to . . . extend[ ] the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict *following a jury verdict of guilty*, to a situation where the jury is unable to agree on a verdict.") (emphasis added); *id.* at 326, 104 S. Ct. 3081 ("a trial court's declaration of a mistrial *following a hung jury* is not an event that terminates the original jeopardy to which petitioner was subjected") (emphasis added). The *Richardson*

judgment of acquittal by moving for a new trial." *Id.* at 17, 98 S. Ct. 2141. Moreover, "it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient. . . . [Such an] appellate decision unmistakably mean[s] that the District Court . . . erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in [the defendants'] position and others who would enjoy the benefit of a correct decision by the District Court." *Id.* at 11, 98 S. Ct. 2141 (emphasis original). It would be similarly irrational to conclude here that because Jimenez Recio and Lopez-Meza were barred until now from appealing the district court's denial of their motion for acquittal after the first trial, they have somehow "waived" their right to mount such a challenge.

I would therefore recognize and decide this case on the defendants' respective claims that the government presented insufficient evidence at the first trial. As the majority opinion aptly reasons,[3] the government's case with respect to the single load conspiracy cannot withstand *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997). Critically, the government's own expert, Agent Hinton, as well as its star witness, Arce, testified that but for the government's intervention, Arce and Sotelo would have driven the truck themselves to the putative "stash house" at Nu Acres. Furthermore, the only evidence in the record of any pre-seizure involvement

holding is therefore inapposite to the present case, since here the jury returned guilty verdicts against Jimenez Recio and Lopez-Meza at their first trial, prior to the district court's declaration of a mistrial.

[3] Such reasoning with respect to the single load theory applies to both the first and second trials.

on the part of Jimenez Recio and Lopez-Meza consisted of a handful of phone calls, for which there was uncontroverted evidence that some of the calls made on the phone card possessed by Lopez-Meza could not possibly have been made by him. The conclusion is therefore inescapable that the defendants would almost certainly not have been involved in the transaction were it not for the government's intervention.

Put another way, any communication which may have taken place between Jimenez Recio, Lopez-Meza, and the central traffickers before the drug seizure could not have contemplated a role for them in delivering these drugs. If anything, such evidence may be probative of involvement in a broader conspiracy (as argued by the government at the second trial), but not in the single transaction. The government's *post*-seizure evidence notwithstanding (e.g., more phone and pager calls to and from Jimenez Recio and Lopez-Meza; the defendants' behavior at the Karcher Mall and at the time of arrest; and Jimenez Recio's purchase of non-owner insurance), this does not amount to evidence beyond a reasonable doubt of *pre*-seizure involvement on the part of the defendants, at least with respect to the single load transaction.

In sum, the unavoidable inference that Jimenez Recio and Lopez-Meza would not have been involved in the transaction had the original delivery proceeded as planned precludes a finding of conspiracy beyond a reasonable doubt. Inasmuch as we are bound by *Cruz*, as the dissent concedes, *see infra* Dissenting Op. 1079 n.2, we have no choice but to reverse.[4] I therefore would

[4] Tellingly, apart from a brief footnote, the dissent's analysis avoids any mention of *Cruz* whatsoever.

overturn the defendants' convictions based on the insufficiency of the government's case at the first trial alone.

Having said this, however, I also concur in the majority holding that the evidence presented at the second trial was again insufficient to convict the defendants beyond a reasonable doubt. To be sure, in my opinion, this is a closer call; the dissent correctly notes that the government presented more detailed evidence of phone and pager calls that may have involved Lopez-Meza, Jimenez Recio, Jose Meza (a.k.a.Raul), and others. Other circumstantial evidence —such as Jimenez Recio's purchase of non-owner's insurance, Lopez-Meza's connection to his uncle Raul, the value of the drugs transported, and Agent Hinton's testimony as to the likely sophistication and complexity of the drug operation—could militate in favor of a finding that the defendants may have been involved in an ongoing drug trafficking scheme. However, as the majority opinion properly reasons, precedent again prevents our finding the defendants guilty beyond a reasonable doubt of participation in a broader conspiracy. *See United States v. Umagat*, 998 F.2d 770 (9th Cir. 1993).

Under *Umagat*, the relatively minor role played by "mules" such as Jimenez Recio and Lopez-Meza does not justify imputing to them knowledge of and responsibility for a broader conspiracy. Notably, in *Umagat*, the government identified and proved the existence of four separate drug transactions; here, the government could not identify any transactions beyond the single load, much less demonstrate knowledge or participation in them by either defendant. Indeed, the bulk of the evidence presented by the government speaks only to

the likelihood that a complex operation existed. It says nothing about whether bit players like Jimenez Recio and Lopez-Meza knew of and should be held responsible for involvement in other trafficking offenses. Significantly, the dissent omits virtually any discussion of *Umagat*.

Accordingly, I concur in the majority opinion.

RONALD M. GOULD, Circuit Judge, dissenting:

I. PROCEDURAL BACKGROUND

Jimenez Recio and Lopez-Meza proceeded to trial ("first trial") on counts of (1) conspiracy to distribute cocaine and/or marijuana, and (2) possession with intent to distribute cocaine and/or marijuana. The jury returned guilty verdicts on both counts. Lopez-Meza moved for judgment of acquittal on both the conspiracy count and the possession count under Federal Rule of Criminal Procedure 29(c). Jimenez Recio moved for judgment of acquittal on the conspiracy count also pursuant to Rule 29(c).[1] Both defendants argued that the evidence presented at trial was insufficient for a reasonable jury to reach a finding of guilt beyond a reasonable doubt. The district court denied the

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[1] The court today in part holds that Jimenez Recio's counsel was ineffective for failure to move for acquittal on Count Two after the first trial. I conclude that we should not reach Jimenez Recio's claim of ineffective assistance of counsel in the first trial. We ordinarily do not reach ineffective assistance of counsel claims on direct appeal. See *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988). Such claims normally should be raised in habeas corpus proceedings, which permit counsel "to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted." *Id.* There are two exceptions to this general rule: (1) if the record is sufficiently developed to permit review and determination of the issue, or (2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel. *See United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000). Here, the record lacks any mention of Jimenez Recio's lawyer's reasons for failing to make the motion. Also, Jimenez Recio's legal representation was not so inadequate that it obviously denied him a Sixth Amendment right to counsel. I would not reach Jimenez Recio's ineffective assistance of counsel claim. But if reached on this record, I would deny it.

motions, but found sufficient error in the proceedings *sua sponte* to convert the Rule 29(c) motions into motions for a new trial pursuant to Federal Rule of Criminal Procedure 33. The district court then granted the motions for a new trial, vacated the convictions from the first trial, and ordered a second trial on the conspiracy count for both Jimenez Recio and Lopez-Meza, a second trial on the possession count for Lopez-Meza, and sentencing on the possession count for Jimenez Recio.

The case proceeded to trial again ("second trial"). Jimenez Recio and Lopez-Meza were re-tried on the conspiracy count. The government dropped the possession count against Lopez-Meza. The jury returned guilty verdicts, and Jimenez Recio and Lopez-Meza again moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), contending that the evidence presented in the second trial was insufficient for a reasonable jury to reach a finding of guilt. The district court denied the motions.

The court today reverses the convictions from the second trial, holding that the government presented insufficient evidence in the second trial. I respectfully dissent because I take a different view of the evidence, under the proper legal standards. This case poses an important issue concerning the scope of reasonable inferences that may be drawn by a jury from evidence of criminal conspiracy. I respectfully dissent because I would hold that there was unmistakably more than sufficient evidence in the second trial to uphold the jury's verdict. The majority today errs on this crucial issue, and then does not reach the other issues presented by the parties regarding the second trial. Having also reviewed these other issues, I would affirm the

district court's decision to deny the defendants' motions for a judgment of acquittal after the second trial, and let the jury verdict stand.

II. FACTUAL BACKGROUND

On November 18, 1997, a Nevada police officer stopped a white flatbed truck occupied by Manuel Sotelo ("Sotelo") and Ramiro Arce ("Arce"). After a consent search the police found 369 pounds of marijuana and 14.8 pounds of cocaine. When questioned, Sotelo and Arce indicated that they did not know about the drugs and were merely driving the truck to Idaho where they had been instructed to leave it parked at the Karcher Mall.

The government's law enforcement agents then permissibly set up a sting. On November 19, 1997, the government placed the truck, still containing most of the drugs, at the Karcher Mall. Arce used a cellular phone to call a pager number that he had previously used to make arrangements for the pickup of the truck. When someone called back, Arce described the truck's location to the unknown caller. The unknown caller stated that "he was going to call a muchacho to come and get the truck."

About three hours later, a blue car driven by Lopez-Meza pulled up to the truck and stopped. Jimenez Recio left the car and entered the truck. Both vehicles proceeded to drive west on different back roads. The police then stopped each vehicle, whereupon each occupant told the police a different and fabulously incredible story. The police smelled marijuana in the car that Lopez-Meza had been driving. The police also found cell phones, phone cards and pagers on both

defendants. The police then arrested Jimenez Recio and Lopez-Meza.

Subsequently, Arce pled guilty and testified against Jimenez Recio and Lopez-Meza at trial.

III. DISCUSSION

A. Sufficiency of the evidence

We must review the evidence that was presented at the second trial against Jimenez Recio and Lopez-Meza in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999). "Once a conspiracy exists, evidence establishing beyond a reasonable doubt defendant's connection with the conspiracy, even though the connection is slight, is sufficient to convict defendant of knowing participation in the conspiracy." *United States v. Bautista-Avila*, 6 F.3d 1360, 1362 (9th Cir. 1993) (citations and quotation marks omitted).

At the second trial, the government presented evidence pursuant to two different conspiracy theories. First, the government argued that Jimenez Recio and Lopez-Meza were involved in a conspiracy to ship the one load of drugs in their possession upon arrest. The government had the burden to establish beyond a reasonable doubt that Jimenez Recio and Lopez-Meza joined or became members of this single-load conspiracy before police officers seized the drugs from Arce and Sotelo at 1:18 a.m. on November 18, 1997. *United States v. Cruz*, 127 F.3d 791, 795 (9th Cir. 1997) (conspiracy to distribute illegal drugs ends when law

enforcement authorities confiscate the drugs).[2] The government also argued that Jimenez Recio and Lopez-Meza were involved in a broader conspiracy, a conspiracy that was not limited to a single load. Regarding the broader conspiracy, the government bore the burden to prove that Jimenez Recio and Lopez-Meza knew or had reason to know of the broader conspiracy, whether before or after November 18, 1997, and that Jimenez Recio and Lopez-Meza had knowledge or constructive knowledge of the scope of the broader conspiracy and embraced its objectives. *United States v. Umagat*, 998 F.2d 770, 772-773 (9th Cir. 1993)

When we view the evidence here in the light most favorable to the government, a reasonable jury could have found, beyond a reasonable doubt, that there was sufficient evidence linking Jimenez Recio and Lopez-Meza to a conspiracy that ended when police officers seized the drugs from Arce and Sotelo at 1:18 a.m. on November 18, 1997. Moreover, a reasonable jury could have found evidence sufficient to show constructive knowledge on the part of Jimenez Recio and Lopez-Meza of a broader conspiracy involving more loads than that seized on November 18, 1997.

SINGLE-LOAD CONSPIRACY:

The following evidence was presented at trial from which a jury reasonably could conclude that Jimenez Recio and Lopez-Meza were involved in a single-load

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[2] This panel is bound by *Cruz* as authoritative precedent. However, for the reasons stated by Judge Hall in dissent in *Cruz*, I believe *Cruz* totally inconsistent with long established and appropriate principles of the law of conspiracy. Though we are now bound by *Cruz*, and the district court was correct to apply it, I believe that it is an ill-advised precedent that our court should overrule en banc at the earliest opportunity.

conspiracy that ended when the drugs were seized on November 18, 1997:

Jimenez Recio:

Jimenez Recio told a totally fanciful and incredible story upon his arrest, from which a reasonable jury could draw an inference of guilt. Although police watched Lopez-Meza drop Jimenez Recio off at the mall where he picked up the truck, Jimenez Recio stated that he did not know how he got to the mall. When asked what he had been doing at the mall, Jimenez Recio said that he was shopping, and that he ran into a man who asked him to drive the truck to Jimenez Recio's house for $250, and the man would pick it up later. Although Jimenez Recio's house was a thirty-five to forty-minute drive from the mall on the interstate, Jimenez Recio's explanation for taking a longer back-road route was "I just like to drive in the country." Moreover, while Jimenez Recio told the arresting officer that he was going to his house, when asked the address he first gave one address, then another, then stated that he could not remember the address where he lived. The arresting officer testified that he did not believe that Jimenez Recio told the truth when he was arrested and further testified that based in part on Jimenez Recio's fanciful story, the officer believed that Jimenez Recio knew of the contents of the truck. This story is so unbelievable that a reasonable jury would almost certainly view it as an implied admission of guilt. Although the majority casually assumes that this implied admission related only to Jimenez Recio's post-seizure crimes without crediting or even discussing all pertinent evidence, the government presented evidence from which a reasonable jury might conclude beyond a reasonable doubt that Jimenez Recio was involved in

the conspiracy before the seizure. Thus the majority improperly invades the jury's province.

The government presented evidence that Jimenez Recio was arrested driving a truckload of marijuana and cocaine with a retail value of between $10 and $12 million.[3] An expert on drug trafficking conspiracies testified that the quantity and the value of the drugs found in the truck driven by Jimenez Recio indicated that someone trusted Jimenez Recio enough to let him drive. From this evidence and testimony, a jury might reasonably infer that co-conspirators would not entrust such a large value of drugs to a person not integrally involved in the conspiracy. It is unlikely that the unidentified conspirator on the phone who stated that he would send a "muchacho" would send an outsider to transport such valuable cargo. While there may be other theoretical possibilities, a jury reasonably could infer that the conspirators would send someone highly trusted, familiar with the conspiracy's scope and involved in the plan of illicit drug distribution.

Moreover, Jimenez Recio carried a pager with him when he was arrested driving the truck, and Arce and Sotelo, co-conspirators arrested on November 18, 1997 at 1:18 a.m., were found carrying two pagers and a cell phone. A government expert witness testified that lots of communication is necessary to move drugs, and the way traffickers use communications demonstrates how communications can be kept secret, and secrecy is necessary. The expert testified that communication de-

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[3] One witness testified that the drugs were valued between $10 and $12 million while another witness placed value between $1 and $2 million. Because a reasonable jury could have credited the testimony valuing the drugs between $10 and $12 [million], I refer to these amounts in support of the verdict.

vices typically used by complex drug organizations are cell phones and pagers because the users of these devices can be physically located anywhere, untraceable by the authorities. When viewed in the light most favorable to the government, a jury reasonably might conclude that, because Jimenez Recio was found in possession of more than $10 million worth of marijuana and cocaine, Jimenez Recio's pager is evidence that he was involved in a drug conspiracy insofar as testimony demonstrated that the mode of communication among the conspirators in this larger conspiracy was via pagers and telephone calls.

It is one thing to say that ubiquitous pagers used by messengers, executives, workers, and professionals are not in themselves evidence of participation in a drug conspiracy when found in usual settings, but it is quite another thing to say that multiple pagers in the hands of persons found astride a truckload of marijuana and cocaine valued beyond $10 million by one witness are irrelevant, particularly where coconspirators Arce and Sotelo were also found with pagers. A key point ignored by the majority is the expert testimony linking pagers to drug conspiracies, testimony that a jury could have properly given weight. To disparage the pager testimony from an appellate distance is merely to argue about the weight of the evidence. This we cannot do because we must view the evidence in the light most favorable to the government.

Perhaps more importantly, Jimenez Recio carried a non-owned named operator insurance policy in his jacket pocket when he was arrested. Such a policy insures vehicle operation by a non-owner of that vehicle. An agent testified that during his 25-year career as an immigration agent which involved several thousands of

arrests, he had never encountered a policy like the one Jimenez Recio owned. The government presented evidence demonstrating that Jimenez Recio renewed the policy between November 2, 1997 and the date of Jimenez Recio's arrest, at most two weeks before the drugs were seized and at most two weeks before he was arrested driving a truck he did not own loaded with more than $10 million of marijuana and cocaine. In the light most favorable to the government, a reasonable jury might infer that this was not "coincidence," and, instead, that Jimenez Recio purchased the insurance policy in the days leading up to the seizure because he knew then that his job in the conspiracy was to drive a truck that he did not own carrying the marijuana and cocaine. Even drug-trafficking conspirators, it seems, want insurance.

Finally, and perhaps most importantly, the government presented evidence that a pin number associated with a telephone card that Jimenez Recio carried when he was arrested had called a number associated with a place called "Nu Acres" on November 15th and 17th. The government also presented evidence that the Nu Acres number was associated with a cell phone used by Lopez-Meza and a man named Raul. Co-defendant Arce, who had turned on the conspiracy by cooperating in the government sting, testified that Sotelo mentioned the name "Raul"[4] during a phone conversation about the drug shipment before the seizure. The

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[4] There is testimony in the second trial from which the jury easily could conclude that "Raul, aka" "Jose Meza" was a key player in the larger conspiracy. This included evidence that he was the uncle of Lopez-Meza, that he resided at Nu Acres, the destination for the drugs, and that his name was mentioned by co-conspirator Sotelo while discussing the drugs.

government presented evidence that a phone card that Lopez-Meza carried when he was arrested also called Nu Acres on November 14 and 17. Finally, the government presented evidence from which a jury could reasonably infer that the Nu Acres residence was the destination of the drug shipment, in part because of geographical location and in part because the Nu Acres number was the number called right before the sting. An agent testified that the fact that Jimenez Recio's phone card was used to call Nu Acres before the seizure and that the same number was called right before the sting, suggests that Jimenez Recio knew the people living at Nu Acres, the destination of the drugs. From this evidence, a jury reasonably could infer that Jimenez Recio made these two calls to Nu Acres and possessed knowledge of the conspiracy and its members before the date the drugs were seized.

The evidence of the phone calls to Nu Acres and the non-owner operator insurance policy combined with probative evidence of Jimenez Recio's incredible story upon arrest, the use of pagers and the very high value of the drugs in the truck, is solid evidence when viewed in the light most favorable to the government; it is clearly sufficient for a reasonable jury to have found beyond a reasonable doubt that Jimenez Recio was involved in the conspiracy before the seizure of the drugs.

Lopez-Meza:

The situation with Lopez-Meza is much the same as with Jimenez Recio. Lopez-Meza told a different but equally bizarre and incredible story upon arrest. He told the police that he lived with his girlfriend, but he did not know her last name. When asked what he was

doing that night, Lopez-Meza denied that he had been to the mall, and said he was "out driving around" and that he was going to see his girlfriend. When asked where she lived, however, Lopez-Meza stated that he did not even know the location of the city where his girlfriend lived. An officer testified that he did not believe that Lopez-Meza told the truth. Again, the majority apparently concludes that this implied admission of guilt merely evidences post-seizure guilt, but the government presented sufficient evidence that Lopez-Meza, like Jimenez Recio, was involved in the conspiracy before the seizure. Lopez-Meza was arrested carrying two pagers and two phone cards, and with Jimenez Recio was involved transporting an exceptionally high value of marijuana and cocaine. Again, given the expert testimony demonstrating the significance of these communication devices and the high value of the drugs, it seems almost certain, and at least a jury reasonably could infer, that the conspirators sent Lopez-Meza because he was trusted and involved.

The government also put forth evidence connecting Lopez-Meza to a man named Raul, a man who, during the time-frame at issue in this case, lived at Nu Acres, the place proffered by the government as the destination of the drugs and the target of the conspirators' frequent cell phone calls. Mireya Alvarez testified that Lopez-Meza'[s] uncle was named Jose Meza, and an agent testified that Jose Meza was also known as Raul. Mireya Alvarez also testified that Lopez-Meza and Jose Meza sometimes lived under the same roof and shared use of a cell phone in her possession. The government presented evidence that this cell phone was the Nu Acres number. Arce testified that Sotelo mentioned "Raul" in a cell phone conversation regarding the drug

shipment before the sting. Arce also testified that after the sting, Arce, Sotelo, Lopez-Meza and Jimenez Recio spoke while in jail and Lopez-Meza mentioned Raul "as a part of this case." When this connection between Lopez-Meza and Raul and Nu Acres is viewed in the light most favorable to the government, a reasonable jury certainly could connect Lopez-Meza to the conspiracy before the seizure of the drugs.

Beyond Lopez-Meza's connection to Raul, the government presented through phone-toll records and testimony regarding those records, that Lopez-Meza, like Jimenez Recio, was connected to and had knowledge of the other conspirators before the seizure of the drugs. A phone card found in Lopez-Meza'[s] possession when he was arrested called Nu Acres on November 14, again on November 15, again on November 17, 6 minutes before Jimenez Recio called the same number, and again on November 18. For the same reasons Jimenez Recio's two calls to Nu Acres preceding the sting demonstrate Jimenez Recio's prior knowledge of the conspiracy and its members, Lopez-Meza'[s] four calls preceding the sting demonstrate his.

The connection between Lopez-Meza, Raul and Nu Acres, the drug's destination, the evidence of Lopez-Meza's implausible story, his two pagers and two phone cards, and his participation in the transportation of more than $10 million of marijuana and cocaine, together demonstrate that a reasonable jury could determine Lopez-Meza's participation in the pre-seizure conspiracy beyond a reasonable doubt, and in my view this evidence is more than sufficient to permit a jury verdict of conviction in the second trial.

BROADER CONSPIRACY:

Moreover, the government presented more than ample evidence from which a reasonable jury could have found constructive knowledge on the part of Jimenez Recio and Lopez-Meza of a conspiracy involving more loads than the one seized on November 18, 1997. This evidence, not surprisingly, is circumstantial, but of course, conspirators do not often explicitly proclaim their knowledge of covert illegal operations. The majority does not even discuss this evidence.

Special Agent Anthony Hinton ("Agent Hinton") of the DEA, qualified by the government as an expert on identifying and investigating drug organization, testified about factors that characterize complex drug organizations. He testified that the drug organization involving Jimenez Recio and Lopez-Meza was large, complex and involved more transactions than the one load of drugs seized by the government. Agent Hinton's testimony was thorough and specific.

First, Agent Hinton testified that the quantity of drugs involved in a drug transaction indicates the level of sophistication of a drug operation: the larger the organization the larger the amount of drugs moved. A large load of marijuana weighs between 100 pounds and a ton. A large load of cocaine weighs between 100 and 200 kilos.

Agent Hinton also testified that when the drug shipped is cocaine, the quality of the cocaine indicates the sophistication level of a drug operation: the closer to the top of the organization and the drug production the drug traffickers are, the purer the cocaine. For example, if the cocaine is produced and packaged in Columbia, when it comes directly from Columbia it is

still packaged in a pure form and the bricks are not broken up. Agent Hinton noted that the value of narcotics relates directly to purity.

Agent Hinton also testified that the number of players involved in a particular organization indicates the sophistication level of a drug operation: the more players involved, the larger the organization. Further, Agent Hinton testified that the number of transactions indicates the sophistication level of the drug operation: the more transactions, the larger the organization. These factors are linked: the more people involved in an organization, the more capable the organization is to complete more transactions. Also, the agent testified that the purity and quantity of drugs in a given transaction together indicate the complexity of a drug organization: the purer the drugs, the larger the quantity, the more complex the organization.

Further, Agent Hinton testified that the geographic reach of a drug trafficking organization indicates its level of complexity: "[A] smaller organization may have people that can only move drugs to one part of the country but not others. In a larger organization, you will have more people that can specialize in different areas of the country." Agent Hinton explained:

> One of the most difficult parts of the drug trafficking organization is moving its product from the producers to the user. And the most dangerous part of that is actually moving the drugs geographically from one part of the country to another. In that respect, you need people that know what they are doing, how to move drugs from one place to another, and that means you need people that know different parts of the country so that they can move those drugs to different parts of the country.

Agent Hinton also testified that knowledge of individual players in a drug organization varies depending on the size of the organization: In a smaller organization, the players know one another because trafficking involves fewer transactions and fewer people and roles are strictly defined. In a larger drug organization, it would be uncommon for people at the top to know all of the people in the organization, especially those near the bottom.

Further, Agent Hinton testified that communication among players in a drug trafficking organization indicates the size and nature of the organization:

> To move drugs, there has to be a lot of communication as to when the drugs are moved, how they are moved, quantities that are moved, because, obviously, in a drug organization, their whole purpose is to move an illegal substance. And to be successful at that, they have to be very secret. And the way that they use their communication shows you how they can be secret.

Agent Hinton then testified that the communication devices in the investigation of the drugs seized in this case were phones, cellular telephones, and pagers. Agent Hinton testified that these devices are important indications of the size and scope of the drug trafficking organization here because of the secrecy that such devices provide.

> "The individual using a cell phone can be anywhere at any time when they make the call. When they give out orders, they can be anywhere and nobody else will know where thy are when they are making those calls. They can make a call into a pager. And using the out-of-state area code, for example, to,

say, Chicago, they don't have to be in Chicago necessarily, they can be in any area of the country when they make their call into the pager and when a person calls back at that number. [Moreover, with] the use of cellular phones nowadays, you don't have to have real identification to obtain a phone. And the telephone is not in a particular spot that you can trace it back to. Nowadays, you can buy a cellular telephone like you can a phone card [with a certain number of minutes on it, and] when the time's up, you just toss it, and nobody can trace it back to you."

Agent Hinton further explained that pay telephones are used in the same way as cellular telephones because people do not know where the traffickers live. "If you use pay phones, you can drop in anywhere you want, page someone to your cell phone, page them to the pay phone, they call you back, and you're gone."

After explaining the factors that go into a determination regarding the size and scope of a complex drug trafficking operation, Agent Hinton testified that, in his opinion, the conspiracy here was "a large, complex drug organization . . . [t]hat was involved in other loads." The factors that lead him to draw this conclusion, he testified, were

> first . . . the fact that the load car was found with [drug] residue in it that did not come from the packages that we seized. They were not open. They had not been cut open or anything. The planks on the back of the truck had been used before. There were numerous other holes in the sides of the truck. Also, because of the fact that there was such a large amount of drugs that were seized in this investigation, because I know that when involved in drug organizations, getting to that quantity of loads is very difficult because it is based on trust, and trust is built over time.

Agent Hinton's opinion that this case, with its massive drug seizure, involved a drug organization that extended beyond the single load seized on November 18, 1997 is not merely common sense; it also is corroborated by other evidence in the record. Strikingly, Lopez-Meza was the nephew of key conspiracy figure Raul. And Jimenez Recio was arrested carrying non-owners vehicle operation insurance, not just covering the time period of the load seized, but also an earlier period of such insurance coverage that ended on October 2, 1997. Further, Jimenez Recio was arrested carrying twelve receipts corresponding to non-owners operation insurance payments. A jury perhaps might infer from these receipts that Jimenez Recio regularly insured himself while making nefarious deliveries of drugs. But, if more is needed to prove that Jimenez Recio and Lopez-Meza were involved in a larger conspiracy, there was much more including the size and quality of the captured drug shipment; the use of cell phones, pagers, pay phones and phone cards for purposes of coordinated stealth; the geographic reach of the participants in the conspiracy; the truck modifications and marijuana residue suggesting prior illicit shipments; and the expert testimony linking the above evidence to the prototype for major drug conspiracy and suggesting that the conspirators would not entrust $10 million of drugs to persons they did not trust. There was ample evidence for the jury to conclude beyond a reasonable doubt that Lopez-Meza and Jimenez Recio knew of and engaged in the broader conspiracy.

Based on the evidence presented at trial, particularly the expert testimony of Agent Hinton, a reasonable jury could determine beyond a reasonable doubt that the drug trafficking operation here involved more than the single load that was seized. The evidence also demonstrates that Jimenez Recio and Lopez-Meza had actual or constructive knowledge of the conspiracy and its scope. A jury was permitted to credit testimony regarding trust that builds over time, trust among scoundrels necessary for illicit transport of drugs; Jimenez Recio and Lopez-Meza's possession and use of sophisticated drug-trafficking communication devices; and the quantity, quality and value of the drugs seized. This evidence is more than sufficient to permit a jury beyond reasonable doubt to find Jimenez Recio and Lopez-Meza guilty of knowledge and participation in a broad conspiracy.

B. Other alleged errors

In addition to arguing that the evidence was insufficient to convict, Jimenez Recio and Lopez-Meza make several other arguments to support their contention that the district court erred by denying their motions for judgment of acquittal after they were convicted in a second trial by jury. The majority concludes that evidence of conspiracy was insufficient and does not reach these other issues. Because I view the evidence of conspiracy as more than sufficient, I reach these other arguments, but find them unpersuasive.

Initially, Jimenez Recio and Lopez-Meza assert three grounds of error regarding jury instructions. The first ground is that the district court gave alternative jury instructions, the first for the pre-seizure conspiracy, the second for an alternative larger conspiracy. Lopez-

Meza and Jimenez Recio argue that the district court erred by giving two separate conspiracy instructions because, while it gave the jury a general unanimity instruction, it did not instruct the jury that it must unanimously agree on one of the two conspiracy theories.

We review a district court's formulation of jury instructions for abuse of discretion. *See United States v. Beltran-Garcia*, 179 F.3d 1200, 1204 (9th Cir. 1999). In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. *See* id. at 1205. The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. *See United States v. Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982). Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing that the district court abused its discretion. *See United States v. de Cruz*, 82 F.3d 856, 864-65 (9th Cir. 1996). In *de Cruz*, where the defendant failed to demonstrate prejudice from an imperfect instruction, we held that the district court did not abuse its discretion, *id.* Further, "the jury must be presumed to have followed [a] unanimity instruction and all agreed to at least one of several possible conspiracies even though no specific instruction was given to that effect." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (citing *United States v. Friedman*, 445 F.2d 1076, 1084-85 (9th Cir. 1971)). Only when there appears to be a genuine possibility that the jury was confused or that a conviction resulted from different jurors concluding that a defendant committed different acts, general unanimity instructions do not suffice. *See Echeverry*, 719 F.2d at 975 (concluding that potential for such

confusion exists when the jury presents questions indicating their confusion concerning multiple conspiracies).

Here, Jimenez Recio and Lopez-Meza assert nothing more than the existence of alternative conspiracy instructions to demonstrate the possibility of genuine jury confusion. The presumption that jurors have followed a general unanimity instruction when several possible conspiracies were proffered holds absent evidence that there is "a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice." *Echeverry*, 719 F.2d at 975. Here, Jimenez Recio and Lopez-Meza have not with any specificity shown true potential for juror confusion. Speculation is inadequate to defeat a presumption that a jury verdict is based on jurors following instructions. Further, Jimenez Recio and Lopez-Meza have not demonstrated prejudice from the lack of a more particularized jury instruction. The district court did not abuse its discretion by failing to give a more particularized jury instruction.

Jimenez Recio and Lopez-Meza also claim that, while the superceding indictment in this case alleges that they conspired to violate the narcotics law "from on or about a date uncertain, but by November 19, 1997," the district court's jury instruction indicated that the jurors could find Jimenez Recio and Lopez-Meza guilty of the larger conspiracy, "whether [they joined] before or after November 19, 1997." Jimenez Recio and Lopez-Meza argue that because the indictment limits proof to pre-seizure evidence, the alternative larger conspiracy theory was never brought before the grand jury, thus

they contend that to instruct on the larger theory constituted an impermissible variance.

Although it appears that Jimenez Recio and Lopez-Meza objected to the jury instruction for the larger conspiracy, they failed to make a variance argument to the district court. We review only for plain error. *See United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). We may exercise our discretion to correct such an error only when (1) the error is obvious; (2) the error affects substantial rights; and (3) a miscarriage of justice would otherwise result. *See United States v. Sayetsitty*, 107 F.3d 1405, 1411-12 (9th Cir. 1997) (quoting *United States v. Olano*, 507 U.S. 725, 734-736, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993)). An error is "clear" or "obvious" only if "a competent district judge should be able to avoid it without benefit of objection." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997).

The Fifth Amendment grants a defendant the right to be tried only on the grand jury's indictment. *See United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991). Sometimes divergence of trial proof from an indictment is harmless error; other times such divergence constitutes an amendment that broadens the indictment, requiring per se reversal. *See id.* When time is not a material element of an offense, however, the court may constructively amend the indictment without violating the Fifth Amendment at all. *See United States v. Laykin*, 886 F.2d 1534, 1544 (9th Cir. 1989) (requiring only that the defendants had adequate notice of the charges against them); *United States v. Echeverry*, 698 F.2d 375, 377 (9th Cir. 1983) (dictum) (conspiracy conviction could be affirmed if the jury

agreed upon a conspiracy of some duration even if not the time frame as charged in the indictment).

This variance issue might have presented a close question if Jimenez Recio and Lopez-Meza had properly objected. However, they did not do so. In review for plain error it is significant that even if the indictment time frame differed from the jury instruction time frame in the second trial, the end date of the conspiracy was not an element of the crime charged against Jimenez Recio and Lopez-Meza. *See Laykin*, 886 F.2d at 1545. Furthermore, because Jimenez Recio and Lopez-Meza were tried on the larger conspiracy theory in the first trial, they cannot claim that they lacked notice of the larger conspiracy theory in the second trial. Under such circumstances, any variance did not rise to the level of plain error.

Jimenez Recio and Lopez-Meza also make a cumbersome and complex argument that the wording of the jury instruction concerning the larger conspiracy impermissibly placed the burden on them affirmatively to prove the termination of the smaller conspiracy by demonstrating that no other loads of drugs existed. Again, because Jimenez Recio and Lopez-Meza did not raise this argument before the district court, we review only for plain error.

There was no plain error from burden shifting. Every paragraph of Instruction No. 24 places the burden on the government to prove the defendants' involvement in the conspiracy, whether the small or the large, "beyond a reasonable doubt." Any lack of clarity in the instructions does not rise to the level of plain error because a competent district judge cannot be expected to avoid this alleged complex burden shifting error without benefit of objection.

Fourth, Jimenez Recio and Lopez-Meza argue that the district court erred by allowing the jury to hear evidence over objection regarding the odor of burned marijuana in the car that Lopez-Meza was driving when he was arrested. Jimenez Recio and Lopez-Meza rely on *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012, 1013 (9th Cir. 1995), to argue that the odor evidence should not have been admitted as an exception to Federal Rule of Evidence 404(b), and in any event, should have been excluded pursuant to Federal Rule of Evidence 403. Their argument lacks merit.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *See United States v. Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997). An appellate court will only reverse for abuse of discretion if an evidentiary error more likely than not affected the verdict. *See United States v. Karterman*, 60 F.3d 576, 579 (9th Cir. 1995). "Other act" evidence can be admitted as an exception to Rule 404(b) if (1) the evidence is "inextricably intertwined" with the charged crime, or (2) if the evidence is necessary "to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Vizcarra-Martinez*, 66 F.3d at 1012, 1013 (excluding personal use methamphetamine in a case involving possession of a chemical precursor). Here, the district court did not abuse its discretion by concluding that the evidence could be admitted as "inextricably intertwined" and going to show knowledge, intent and the absence of mistake. For the same reasons, the district court did not abuse its discretion in finding the odor evidence relevant under Rule 403.

Jimenez Recio and Lopez-Meza also argue that the district court erred by denying a motion for a mistrial

due to prosecutorial misconduct and by failing to give a curative instruction regarding prosecutorial misconduct. I disagree. During trial, the prosecutor referred to a place that the government argued was the intended destination of the drugs as a "stash house." Jimenez Recio and Lopez-Meza objected to the use of this term. The district court sustained the objection, but allowed the government to refer to the residence as the destination of the drugs. At closing argument, the prosecutor again referred to the residence as a "stash house." The defendants objected, moved for a mistrial and requested a limiting instruction. The court sustained the objection, denied the motion for a new trial to allow more leeway because the prosecutor was engaged in argument, and did not give a limiting instruction.

The district court's denial of a motion for a mistrial is reviewed for abuse of discretion. *See United States v. Ramirez*, 176 F.3d 1179, 1183 (9th Cir. 1999). A district court's refusal to give a limiting instruction also is reviewed for abuse of discretion. *See United States v. Soliman*, 813 F.2d 277, 278 (9th Cir. 1987). To determine whether alleged prosecutorial misconduct requires reversal, this court must consider, in the context of the entire trial, whether the conduct appears likely to have affected the jury's ability to judge the evidence fairly. *See United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985). Reversal is only required if it is more probable than not that the alleged misconduct affected the jury's verdict. *See United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990).

Here, the prosecutor's reference to the alleged drug destination as a "stash house" during closing argument may have gone a bit beyond spirited advocacy, as the district court acknowledged by sustaining the defendants' objections. The court, however, instructed the prosecutor to refrain from referring to the alleged destination as the "stash house," and the prosecutor so refrained. Considering the weight of the evidence against Jimenez Recio and Lopez-Meza, and the relatively benign nature of the prosecutor's statement in the context of the rest of the trial, the district court did not abuse its discretion by refusing to grant a motion for a mistrial or by refusing to give a limiting instruction to the jury.

Finally, Jimenez Recio and Lopez-Meza argue that the district court improperly admitted expert testimony under Federal Rules of Evidence 702 and 704 when Agent Hinton, after being qualified as an expert, opined over objection that (1) the conspiracy involved a large and complex organization, and (2) the conspiracy was involved in other prior loads of drugs.

This court reviews for abuse of discretion a district court's decision to admit expert testimony. *See United States v. Campos*, 217 F.3d 707, 710 (9th Cir. 2000). Federal Rule of Evidence 702 provides that a qualified expert may testify if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Federal Rule of Evidence 704 allows a qualified expert to state an opinion regarding an ultimate issue, provided that the ultimate issue does not pertain to the mental state or condition of a defendant in a criminal case.

Here, the district court qualified Hinton as an expert based on his knowledge, experience, training and education. Hinton's testimony that the organization "was involved in other loads," while helping establish the existence of a larger conspiracy, was the agent's

opinion, based on his expertise, of whether the facts and circumstances of this group of people and their activities demonstrated a conspiracy larger than just the one load of marijuana and cocaine. Because Hinton's testimony at all times remained within boundaries set by Rules 702 and 704, the district court did not abuse its discretion by admitting the testimony.

IV. CONCLUSION

The majority correctly is concerned that proof be made of criminal conspiracy beyond a reasonable doubt, but the majority incorrectly invades the province of a jury when it holds that evidence in the second trial was insufficient. The legal test to determine if a second trial was permissible requires us to assess the boundaries of permissible inferences that a jury reasonably could have drawn when viewing all of the evidence in the light most favorable to the government. In this light, the evidence was sufficient to permit the jury to determine, beyond a reasonable doubt, that there was a serious criminal conspiracy in which Jimenez Recio and Lopez-Meza were involved before the drugs were seized. Moreover, the evidence was sufficient for a jury to conclude beyond a reasonable doubt that there existed a broader conspiracy—involving more than one load—in which Jimenez Recio and Lopez-Meza had actual or constructive knowledge and for which Jimenez Recio and Lopez-Meza took deliberate steps. Jimenez Recio and Lopez-Meza sought to advance the conspiracy's unlawful aims by their own unlawful acts.

The majority addresses only a part of the evidence, ignoring key proof considered herein. The majority takes no heed of the fact that a jury was properly instructed to find guilt only if proven beyond a

reasonable doubt. In returning its verdict, the jury said that it had no reasonable doubt. The evidence in the second trial is sufficient to support the jury's decision.[5]

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[5] I also conclude that the evidence at the first trial was sufficient to support a jury verdict of Jimenez Recio and Lopez-Meza's guilt beyond a reasonable doubt in conspiring before the seizure, contrary to the position of the concurring opinion. Because the first trial's evidence was sufficient to convict, I need not address the appellants' contention, credited in the concurrence over the government's opposing view, that double jeopardy barred a second trial.

The majority, in footnote 1, mistakenly urges that the "second trial included all the evidence at the first trial as well as additional testimony analyzing telephone records and the opinion of a government expert that the conspiracy was a large operation." The majority is correct in part in detailing some of the new evidence presented in the second trial. But it is not correct that all evidence at the first trial was presented in the second trial. For example, while evidence in the second trial shows "Raul" as a key conspirator, evidence in the first trial disclosed more, indeed that he was the owner of the drugs. While evidence in the second trial shows that Raul's nephew Lopez-Meza had a very close relationship with Raul, living under the same roof and sharing use of a cell phone, evidence in the first trial included a jail house confrontation, which a jury might have considered threatening to co-conspirator Arce, in which Lopez-Meza said that "He [Lopez-Meza] was the one that helped his Uncle Raoul."

This showing in the first trial, along with the other evidence presented that was substantially similar to that in the second trial, unmistakably was sufficient for a jury to convict beyond a reasonable doubt. The concurrence argues contrary to the great weight of evidence that Jimenez Recio and Lopez-Meza were merely "mules" but the evidence reviewed above shows, to the contrary, both their probable involvement in conspiracy before the drug seizure and their probable participation in a broader conspiracy. As the concurrence sees it, Lopez-Meza might be viewed as a mere "mule" even though he is the nephew of the owner of the drugs seized, the "one who helps" his uncle Raul, and one who shares a cell phone and roof with Raul, and even though he was

I would affirm the district court's correct decision to let the jury verdict stand after the second trial.

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entrusted with an immense truckload of drugs with a value exceeding ten million dollars. The position that Lopez-Meza, or for that matter Jimenez Recio, can be viewed as "mules," unthinking beasts of burden, does not accord with common sense. The evidence in the first trial was sufficient to convict both Jimenez Recio and Lopez-Meza beyond a reasonable doubt. In that trial, as well as in the second trial, the weighing of a mass of damaging evidence was in the jury's province; it is not properly within ours.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-30135, 99-30145
D.C. No. CR-97-00103-BLW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANCISCO JIMENEZ RECIO, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ADRIAN LOPEZ-MEZA, DEFENDANT-APPELLANT

[Filed: Oct. 30, 2001]

Before: BROWNING, B. FLETCHER, and GOULD, Circuit Judges.

ORDER

Judges BROWNING and B. FLETCHER have voted to reject the petition for rehearing. Judge GOULD would have granted the petition.

Judges BROWNING and B. FLETCHER recommended denial of the petition for rehearing en banc. Judge Gould voted to grant the en banc hearing.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R.App. P. 35(b).

The petition for rehearing and for rehearing en banc are DENIED.

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, T.G. NELSON, TROTT, KLEINFELD, WARDLAW, GOULD, TALLMAN, and RAWLINSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

With respect, I believe that our court took a wrong turn in the law of conspiracy in *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997), and today's order demonstrates how far off course we have ventured. By failing to rehear *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2001), en banc, we let stand the aberration wrought by *Cruz* now compounded by *Recio*. In so doing, we erect serious impediments to legitimate law enforcement efforts to combat drug trafficking by mandating the exclusion of relevant, probative, and, indeed, overwhelming evidence of guilt. We also perpetuate conflict with our sister circuits and, in my view, ignore black letter principles of conspiracy law set out for us by the U.S. Supreme Court. I respectfully dissent from the order denying rehearing en banc.

I

To convict Recio and Lopez-Meza of conspiracy under 21 U.S.C. § 846, the government bore the burden of proving (1) that there was an agreement to possess the truck load of cocaine and marijuana in question with intent to distribute; and (2) that Recio and Lopez-Meza knew of the agreement's objectives and intended to help further them. *See United States v. Gil*, 58 F.3d 1414, 1423 n. 5 (9th Cir. 1995); *United States v. Shabani*, 513 U.S. 10, 16, 115 S. Ct. 382, 130 L.Ed.2d 225 (1994). Most surprisingly, the panel majority concluded that there was insufficient evidence to convict.

Even a cursory review of the facts demonstrates the startling nature of the majority's conclusion. Recio and Lopez-Meza were caught red-handed transporting a truck load of cocaine and marijuana worth over $12 million. An unidentified co-conspirator sent them to retrieve the truck from a shopping mall parking lot after police, unbeknownst to Lopez-Meza and Recio, intervened and arrested the original driver Sotelo and passenger Arce, and obtained their cooperation. Police observed Lopez-Meza drive Recio to the mall parking lot and drop him off. Recio drove away in the truck heading west on various back roads, with Lopez-Meza following.

Upon their arrest, both were found with phone cards, pagers, and cell phones. The government introduced expert testimony linking such devices to drug conspiracies; moreover, the particular phone cards and cell phones which they were caught carrying were linked to a "stash house" where the drugs were destined. In addition, both gave highly incriminating statements to police. Recio denied outright that he had been dropped

off; ludicrously, he "stated that he did not know how he got to the mall." 258 F.3d at 1079 [Pet. App. 22a]. He claimed he had been shopping when an unknown man offered him $250 to drive a truck to Recio's own residence, where the man would later pick it up. When asked where he lived, Recio "first gave one address, then another, then stated that he could not remember the address where he lived." *Id.* Judge Gould's dissent aptly observes that "[t]his story is so unbelievable that a reasonable jury would almost certainly view it as an implied admission of guilt." *Id.* at 1079-80. Lopez-Meza gave similarly incriminating statements to police. He explained that he was just "out driving around" and that he was going to see his girlfriend. Although he told police that he lived with his girlfriend, Lopez-Meza could not recall her last name or even the city in which she resided. *Id.* at 1081-82 [Pet. App. 26a-27a].

Without considering the rest of the circumstantial evidence against Recio and Lopez-Meza, which Judge Gould meticulously recites in his pellucid dissent, these facts alone would be more than sufficient to support the conspiracy convictions. There was undoubtedly an agreement to ship the truck load of cocaine and marijuana with intent to distribute, and Recio and Lopez-Meza were obviously knowingly acting in furtherance of this agreement. Indeed, I would go so far as to say that the defendants' sufficiency of the evidence challenge borders on the frivolous.

Nevertheless, the majority reversed, on the strength of *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997). In that case, Cruz was recruited as a substitute drug courier in a methamphetamine distribution conspiracy after police, unbeknownst to the rest of the conspirators, arrested the original courier and seized the drugs.

A divided panel held that a conspiracy ends when its "objective ha[s] been defeated" by government intervention. *Id.* at 795. There, the majority reversed a § 846 conspiracy conviction because the conspiracy for which he was charged "had been terminated by the government's seizure of the methamphetamine before Cruz became involved." *Id.* Applying *Cruz*, the panel majority in *Recio* required the government to demonstrate that there was sufficient evidence linking Recio and Lopez-Meza to the conspiracy *prior to* the government's initial seizure of the truck and arrest of Sotelo and Arce, which, astoundingly, they held ended the conspiracy.

II

One would think that the contradictory and incriminating statements made by Recio and Lopez-Meza would have been relevant to the sufficiency of the evidence of a conspiracy to deliver the multi-million dollar load of cocaine contained in the truck which Recio was caught, red-handed, driving. Rather, according to the majority, the inconsistent and transparently mendacious fables that the defendants concocted to explain their actions "point[ ] only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand." 258 F.3d at 1071 [Pet. App. 4a].

The majority similarly jettisons the incriminating inferences to be drawn from the telecommunication devices that the defendants carried because such evidence is not probative of defendants' *pre-seizure* involvement in the conspiracy—notwithstanding the fact that the majority itself concedes that such evidence

is probative of the defendants' general involvement in the scheme to transport the truck load of drugs:

> As for the pagers they carried, one would expect that whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.

Id. at 1072 [Pet. App. 5a]. But isn't that exactly the point?

In short, the majority purports to examine whether sufficient evidence supports Recio and Lopez-Meza's conspiracy convictions even as it closes its eyes to the most probative evidence of their guilt. It could hardly be more apparent that the *Cruz/Recio* decisions constitute a de facto evidentiary exclusionary rule. Unlike the exclusionary rule familiar from the Fourth and Fifth Amendment contexts, however, the *Cruz/Recio* corollary is not triggered by, nor does it deter, wrongful conduct on the part of law enforcement officers. Indeed, the reverse is true: the paradoxical effect of *Cruz* and *Recio* is to exclude evidence of guilt following successful and entirely *legitimate* intervention by law enforcement agents.

With respect, there is simply no principled basis for *Cruz*'s promulgation of an arbitrary and unprecedented limitation on the duration of a conspiracy, nor its extension by the *Recio* majority to exclude evidence *highly* probative of an ongoing conspiracy to distribute a large quantity of illegal drugs. As a result, Recio and Lopez-Meza receive an undeserved windfall, entirely legitimate law enforcement efforts are compromised,

and, as I discuss below, fundamental black letter principles of the law of conspiracy are distorted.

III

The source of the problem is *Cruz*, an ill-advised precedent, which we should have reconsidered en banc and overruled. I respectfully suggest that *Cruz*, and now *Recio*, conflict with our prior and subsequent precedent, with precedent from our sister circuits, and with black letter principles of the law of conspiracy set down for us by the Supreme Court.

A

Cruz reasons that the drug shipment conspiracy had terminated prior to Cruz's involvement because the government's seizure of the drugs, unbeknownst to the remaining conspirators, "defeated the object" of the conspiracy. But the fact that the government's secret intervention in a conspiracy renders the conspirators' subsequent efforts Sisyphean is immaterial because "the criminal agreement itself is the actus reus" of the offense of conspiracy. *Shabani*, 513 U.S. at 16, 115 S. Ct. 382. Indeed, "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64, 118 S. Ct. 469, 139 L.Ed.2d 352 (1997).

In holding that a conspiracy endures only as long as its ultimate goal remains objectively achievable, *Cruz* imports a defense of factual impossibility into the law of conspiracy in direct conflict with the long-standing, black letter principle that impossibility is not a defense to a conspiracy charge. The Supreme Court and our own Court have made this very point many times before. *See, e.g., Salinas*, 522 U.S. at 65, 118 S. Ct. 469

("It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable itself."); *United States v. Rabinowich*, 238 U.S. 78, 86, 35 S. Ct. 682, 59 L.Ed. 1211 (1915) ("The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable."); *United States v. Fleming*, 215 F.3d 930, 936 (9th Cir. 2000) ("Factual impossibility is not a defense to an inchoate offense" such as conspiracy or attempt.); *United States v. Bosch*, 914 F.2d 1239, 1241 (9th Cir. 1990) (legal impossibility is no defense to conspiracy charge); *United States v. Everett*, 692 F.2d 596, 599 (9th Cir. 1983) (same); *United States v. Rueter*, 536 F.2d 296, 298 (9th Cir. 1976) (rejecting impossibility defense to conspiracy charge, holding that "[t]he accomplishment of the conspiracy's goal is immaterial to the crime").

Other circuits have also had occasion to hold that impossibility is not a defense to conspiracy liability. *See, e.g., United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) (impossibility is not a defense to conspiracy); *United States v. Sobrilski*, 127 F.3d 669, 674-75 (8th Cir. 1997) (same); *United States v. Belardo-Quinones*, 71 F.3d 941, 944 (1st Cir. 1995) (conspiracy may exist even if the object of the conspiracy cannot be achieved); *United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir. 1994) (factual impossibility is not a defense to conspiracy).

Particularly instructive is *Belardo-Quinones*, in which the First Circuit, in a factually analogous context, expressly rejected the very rule adopted in *Cruz*:

> Appellant's argument resembles the one made by appellants in *United States v. Giry*, 818 F.2d 120 (1st Cir. 1987) that because the persons who were to import the cocaine were agents of the Drug Enforcement Agency [DEA] the importation could never actually occur. The court rejected "the faulty assumption that an expressed conspiratorial objective is negated by its factual impossibility." 818 F.2d at 126. Here appellant joined in a conspiracy and performed an essential role in obtaining a boat and crew needed to accomplish the crime. Even if intervening events had made the accomplishment of the criminal purpose impossible all the elements of a criminal conspiracy were present. *There is no basis for making a distinction between those who start a conspiracy that is impossible from the beginning and one who joins in a conspiracy that has become impossible due to intervening events unknown to the conspirators.*

71 F.3d at 944 (emphasis added). The court observed that Belardo-Quinones failed to cite a single case which "support[s] a proposition that conspiracies end because of impossibility when the conspirators are continuing to actively pursue the original criminal goal." *Id.*

B

The majority in *Cruz* concedes that the defendant may have been involved in some *other* conspiracy. The majority reasons that, while it was "factually impossible for Cruz to have been a member of [the charged] conspiracy," that is, a "five-member conspiracy" which included the two co-conspirators arrested prior to Cruz's involvement, "Cruz may have been a member of

a *new* [three-member] conspiracy" between himself and the two remaining co-conspirators. 127 F.3d at 795 n. 4.

But if the so-called "original" conspiracy is deemed to have ended because the government "defeated its objective" by seizing the methamphetamine, how could it be that a *new* conspiracy would spring to life whose objective was foiled *ab initio?* What baffling logic! If the "original" conspiracy had been terminated because the government's seizure of the drugs defeated its objective, then *ipso facto*, no "new" conspiracy to distribute the same seized drugs could possibly come into existence.

Let us temporarily suspend disbelief and entertain the *Cruz* majority's hypothesis that Cruz may not have been involved in the "original" five-member conspiracy, but rather in some "new" conspiracy that did not include the two arrested former co-conspirators. At *most*, this would merely suggest that there was a variance between the indictment and proof adduced at trial. Such a variance would warrant reversal only if it "affect[ed] the substantial rights of the parties." *U.S. v. Duran*, 189 F.3d 1071, 1081 (9th Cir. 1999) (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946)).

As it is, courts have regularly held variances relating merely to the number of individuals alleged to have participated in a conspiracy to be non-prejudicial and thus not fatal to the indictment. *See, e.g., U.S. v. Johnston*, 146 F.3d 785, 791 (10th Cir. 1998) (no fatal variance when evidence at trial did not prove defendant conspired with all named codefendants in indictment so long as it proved he conspired "with others"); *U.S. v. Gaviria*, 116 F.3d 1498, 1533 (D.C. Cir. 1997) (no fatal variance when evidence at trial proved different

number of conspirators than alleged in indictment because no prejudice to defendant); *U.S. v. Twitty*, 72 F.3d 228, 231 (1st Cir. 1995) (no fatal variance between indictment charging conspiracy involving five persons and proof that only four were involved because indictment did not cause unfair prejudice); *U.S. v. Schurr*, 775 F.2d 549, 555 (3d Cir. 1985) (no fatal variance between indictment charging conspiracy involving five persons and proof that only three were involved).

Perhaps the *Cruz* majority advanced the notion that Cruz was involved in some "new" conspiracy because it, too, was somewhat discomfited by the absurdity of concluding that Cruz was not involved in *any* drug distribution conspiracy. But it tendered its hypothesis without so much as a glancing reference to the factors that we have found relevant to the task of distinguishing multiple conspiracies from a single conspiracy. *See, e.g., United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984) (relevant factors include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals). Under long-standing principles of conspiracy law—not to mention plain common sense—a scheme to transport a single shipment of drugs on a single occasion does not morph into two conspiracies simply because some of the original conspirators withdraw upon their arrest and cooperation with police.

This latter point bears emphasis. As Judge Hall observed in her excellent dissent in *Cruz*, its majority confused the question of the withdrawal of a co-conspirator with the question of the duration of a conspiracy. 127 F.3d at 803. While a co-conspirator may terminate his own *participation* in a conspiracy by

taking affirmative acts to "defeat the object of the conspiracy," such withdrawal does not terminate the *conspiracy* itself. *Id.* Quite obviously, it makes no sense at all "to allow remaining conspirators to avoid culpability for acts in furtherance of a conspiracy simply because one or more of their associates have withdrawn or taken steps to defeat the object of the conspiracy." *Id.* Doing so flips the law of co-conspirator withdrawal on its head. Here, paradoxically, thanks to *Cruz*, Recio and Lopez-Meza become the beneficiaries of Arce's own withdrawal and cooperation with police!

C

At bottom, *Cruz*'s distortion of the law of conspiracy appears to have been prompted by policy concerns over the use of government "sting" operations. The majority in *Cruz* opined ~~that~~ "liability for the original conspiracy on the basis posited by the government could be endless," explaining that "[i]t is not difficult to picture Balajadia [the arrested co-conspirator cooperating with police] sitting in the Honolulu Airport Police Station with a copy of the Guam telephone directory in hand, following the detectives' instructions to call all of his acquaintances in Guam to come to Honolulu to help him." 127 F.3d 795 & n. 3.

The *Cruz* majority's concern that government agents will "let their fingers do the walking" is both improper and misplaced. It certainly cannot justify throwing the law of conspiracy into disarray premised upon subjective qualms with perfectly legal law enforcement practices. In any event, we have already recognized a limitation to conspiracy liability in the police sting context. In *United States v. Escobar de Bright*, 742 F.2d 1196 (9th Cir. 1984), we held that there is "neither

a true agreement nor a meeting of minds"—and hence no conspiracy liability—"when an individual 'conspires' to violate the law *with only one other person and that person is a government agent.*" 742 F.2d at 1199 (emphasis added). This principle is a sound one, and follows from the nature of the offense of conspiracy itself, but, of course, had no bearing in either *Cruz* or *Recio*. Instead, both *Cruz* and *Recio* represent back-door attempts to expand the *Escobar* rule in a manner fundamentally inconsistent with *Escobar*'s conceptual foundation. Manifestly, when an individual conspires to violate the law with at least one other "true" conspirator, there *is* a meeting of the minds and hence conspiracy liability, notwithstanding the subsequent intervention of government agents.

IV

It is time that we reinstate the fundamental principle that the duration of a conspiracy is determined by "the scope of the conspiratorial agreement" itself. *Grunewald v. United States*, 353 U.S. 391, 397, 77 S. Ct. 963, 1 L.Ed.2d 931 (1957). With our inquiry properly focused on the agreement to transport the truck load of drugs, it is simply irrelevant that Recio and Lopez-Meza may have joined the conspiracy *after* the government arrested Sotelo and Arce. Manifestly, the conspirators' agreement continued apace following the government's initial intervention—an intervention of which the remaining co-conspirators were not even aware. Equally obviously, Recio and Lopez-Meza intended to further the objectives of this conspiracy, notwithstanding the fact that the *goal* of the conspiracy (unbeknownst to them) became incapable of fulfillment. Under long-established principles of conspiracy law,

these are the *only* elements the government was required to prove in order to convict Recio and Lopez-Meza.

Recio and *Cruz* create intra and inter-circuit conflicts concerning the law of conspiracy and are contrary to Supreme Court precedent. We should have reheard *Recio* en banc so we could overrule *Cruz*.

I respectfully dissent from the regrettable order denying rehearing en banc.

CYNTHIA HOLCOMB HALL, Senior Circuit Judge:

I agree with the views expressed by Judge O'Scannlain.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CR. No. 97-00103-S-BLW

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANCISCO JIMINEZ AND ADRIAN LOPEZ, DEFENDANTS

[Filed: July 27, 1998]

MEMORANDUM DECISION AND ORDER

The Court has before it a Motion by Defendant Francisco Jiminez (hereinafter "Jiminez") for Judgment of Acquittal as to Count I of his conviction, and a Renewed Motion by Defendant Adrian Lopez (hereinafter "Lopez") for Judgment of Acquittal as to both Counts I and II of his conviction. Both Defendants make their motions pursuant to Fed. R. Crim. P. 29(c).

Procedural Background

On January 16, 1998, a Superseding Indictment was filed against Jiminez and Lopez, along with codefendants Ramiro Arce and Manuel Sotelo, alleging one count of conspiracy to distribute controlled substances, and one count of possession with intent to distribute controlled substances as to each Defendant. Prior to trial, Arce entered a plea of guilty to the charges and

agreed to testify against the other Defendants. The case proceeded to trial on March 16, 1998, and on March 23, 1998, a jury returned verdicts of guilty on all counts against all Defendants. Jiminez now moves for judgment of acquittal on Count I, the conspiracy count, an Lopez moves for judgment of acquittal on both counts.[1]

Factual Background

Evidence introduced at trial indicated that the Nevada Highway Patrol stopped Sotelo and Arce as they drove a white Nissan flatbed truck near Las Vegas, Nevada on November 18, at 1:18 a.m. After receiving consent to inspect the vehicle, the officers discovered over 5 kilograms of cocaine and over 375 pounds of marijuana in a hidden compartment under the bed of the truck. Sotelo and Arce were arrested. Upon receiving cooperation from Arce, the authorities discovered that Sotelo and Arce intended to drive the truck to a parking lot in Nampa, Idaho, after which they were to call a phone number and inform the party on the phone that the truck had been "delivered." The authorities decided to transport the truck to Idaho and

[1] The Court would note that many of the same issues considered in evaluating Lopez's motion for judgment of acquittal on his possession with intent to deliver charge, may well apply to Jiminez, as well. However, Jiminez did not file a motion for judgment of acquittal on his possession with intent to deliver charge. District Courts do not have "inherent supervisory power" to grant sua sponte an untimely motion for review of a jury's verdict of guilt, since such action would contradict the plain language of the Federal Rule of Criminal Procedure's filing limits. *See Carlisle v. United States*, 517 U.S. 416, 417 (1996). Thus the Court will not review the conviction of Jiminez on the charge of possession with intent to deliver. *Id.*

deliver the truck as planned in order to catch others that may be involved in this scheme.

The authorities transported the truck to Idaho and delivered it to a parking lot in the Karcher Mall at Nampa, Idaho on the evening of November 19. Upon delivery of the truck the authorities had Arce make the phone call announcing that the truck had arrived. This call was recorded.

The phone recording indicates the party on the telephone agreed to send someone to pick up the truck. A short time later, Defendants Jiminez and Lopez arrived at the parking lot area in a blue Mazda and observed the area for some time. Jiminez then dropped Lopez off at the truck and Jiminez drove away in the blue Mazda, with Lopez driving off separately in the truck. A short time later both were stopped and arrested. Although they were traveling on separate roads they were stopped in close proximity to each other and appeared to be traveling to the same destination.

At trial Arce testified that he had neither seen nor met Lopez or Jiminez prior to his November 18 arrest. Evidence was introduced of phone calls made by Defendants Sotelo, Lopez and Jiminez prior to the Government's seizure of the drugs on November 18 at 1:18 a.m. However, there was no evidence regarding the substance of the telephone calls. In addition, the only connection between the calls made by Sotelo and calls made by either Jiminez or Lopez was that they had all recently called different numbers in the Chicago metropolitan area and they had all called a number attributed to a communal phone used by migrant workers at a work camp in Idaho.

Analysis

The Conspiracy Charge

On review of a motion for acquittal this Court must decide whether, after viewing the evidence in a light most favorable to the jury's verdict, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994); *United States v. Bautista-Avila*, 6 F.3d 1360, 1362 (9th Cir. 1993); *United States v. Kaplan*, 895 F.2d 618, 620 (9th Cir. 1990). Given this standard, Jiminez and Lopez base their motions for acquittal on the recent decision of the Ninth Circuit in *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997). This case held that a conspiracy to distribute and to possess with intent to deliver drugs ends when the government seizes the drugs. *Id.* at 795 (citing *United States v. Castro*, 972 F.2d 1107, 1112 (9th Cir. 1992)). Thus, the principal question for the Court in determining the validity of the Defendants' motions for acquittal is whether there was sufficient evidence introduced at trial for a rational trier of fact to find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18.

In *Cruz*, Defendants Balajadia and Taitano were en route to Guam when authorities arrested them in Honolulu and confiscated methamphetamine they were carrying. *See Cruz*, 127 F.3d at 794. Balajadia subsequently agreed to aid the police. The police had Balajadia call his boss in Guam and tell him Taitano had been arrested with Balajadia's ticket. Balajadia also claimed he had no money to get to Guam and deliver the drugs. Defendant Cruz was dispatched to pick up

the methamphetamine, which the authorities had replaced with rock salt. The Government conceded Cruz was not brought into the drug scheme until after the seizure of the methamphetamine. *Id.* at 795. The Court held that the conspiracy ended, by virtue of the defeat of its object, when the authorities seized the drugs. *Id.* at 795-96. Cruz, therefore, could not be convicted of possession with intent to deliver under a theory of conspirator liability, because he was not a member of the conspiracy when the methamphetamine was possessed by Taitano and Balajadia. *Id.* at 796.

In the present case, Jiminez and Lopez argue that since there is no evidence tying them to the conspiracy prior to the seizure of the drugs in Nevada, an acquittal should be granted on the conspiracy. They point out that Arce testified he had met neither Lopez nor Jiminez prior to his arrest, and no witness testified as to Jiminez's or Lopez's involvement prior to 1:18 a.m. November 18, the point at which the authorities seized the drugs.

The Government maintains there was sufficient evidence for a reasonable jury to convict Lopez and Jiminez on a conspiracy charge because Lopez's and Jiminez's words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge. The Government further attempts to demonstrate the Defendant's link to the conspiracy from evidence of phone calls made prior to 1:18 a.m. on November 18. *See United States' Response to Defendants' Motions for Judgement of Acquittal* at 5. Although there is no evidence of the substance of the phone calls, the telephone records admitted into evidence at trial indicate that, prior to

the drug seizure, Sotelo, Jiminez, and Lopez called the same number in Idaho, and all three had called different numbers in the Chicago area. Evidence of these calls and of their conduct in picking up the truck in Nampa, construed in a light most favorable to the Government, is sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs.

However, in instructing the jury, the Court did not specify that the jury must find that Jiminez and Lopez became members of the conspiracy prior to seizure of the drugs in Nevada. Although it is possible that the jury found that Jiminez and Lopez had joined the conspiracy prior to 1:18 a.m. on November 18, based upon the evidence discussed above, it is also possible that the jury found the Defendants guilty on a theory that they joined the conspiracy after the seizure in Nevada. Thus, the Defendants are entitled to some relief, although, as discussed below, the entry of a judgment of acquittal is not warranted.

The Possession with Intent to Deliver Charge

Lopez also moves for a judgement of acquittal on his possession with intent to deliver charge, arguing that there was insufficient evidence of actual possession of the drugs by him, and that if he can not be found guilty of the conspiracy charge, a possession with intent to deliver conviction can not be held as well. However, this argument ignores the substantial evidence presented at trial which tied him directly to the drugs. Unrefuted evidence introduced at trial demonstrated that he drove the drug-laden truck from the Karcher Mall parking lot followed closely by a number of police

officers. A person who knowingly has direct physical control over a thing at a given time is in actual possession. *See United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir.). A person who, although not in actual possession, has the power and intention at a given time to exercise dominion or control over a thing is in constructive possession. *See Batimana* at 1369; *see also United States v. Terry*, 911 F.2d 272, 279 (9th Cir. 1990). A jury could find the element of possession present if the Defendant had actual or constructive possession either alone or jointly with others. *See Juvera v. United States*, 378 F.2d 433 (9th Cir. 1967); *see also United States v. Restrepo*, 930 F.2d 705, 709 (9th Cir. 1991) (holding that to prove Defendant was guilty of possession with intent to distribute, the Government was required to prove that Defendant knowingly possessed cocaine, either actually or constructively, and that he possessed it with intent to deliver it to another person).

However, the Court instructed the jury that they could also find Lopez guilty of possession with intent to deliver based upon the actions of co-conspirators during the course and in further of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946). This raises the specter that the jury convicted Lopez of the possession with intent to deliver charge, not because of his physical possession of the truck containing the drugs while under the watchful eye of the Government agents, but because of the actions of his alleged co-conspirators, Arce and Sotelo, in transporting the drugs from Arizona to the site of their arrest in Nevada. If the latter was the case, the court's failure to instruct the jury that Lopez could only have joined the conspiracy prior to the seizure of the drugs would call into

question Lopez's conviction for possession with intent to deliver, as well as his conspiracy conviction. *See Cruz*, 127 F.3d 796.

From the evidence presented at trial, a rational trier of fact could have found the essential elements of conspiracy and possession with intent to deliver beyond a reasonable doubt. For this reason, the Defendants' motions for judgment of acquittal cannot be granted. However, because of the Court's error in instructing the jury, the granting of a new trial is, "required in the interest of justice." Fed. R. Crim. P. 33.

The Court is mindful that the Defendants did not move for a new trial. Ordinarily, a District Court lacks the power to sua sponte convert a motion for acquittal to a motion for a new trial. *See* Advisory Committee Notes to Fed. R. Crim. P. 29(c), 1966 Amendments. The Supreme Court has explained that this is because to order a new trial in a case where a court has already determined the evidence to be insufficient would invoke principles of Double Jeopardy. *See Burks v. United States*, 437 U.S. 1 (1978). However, "[d]ouble jeopardy principles do not bar a retrial if a conviction is reversed because of error at the trial if the evidence was sufficient to support the verdict." 2 Charles A. Wright, Federal Practice and Procedure: Criminal, § 470, at 679 (2d ed. 1982) (citing *Greene v. Massey*, 437 U.S. 19, 26 (1978). Indeed, at least one other District Court has converted a motion for acquittal to a motion for a new trial when the basis of the challenge is something other than sufficiency of the evidence. *See United States v. Carter*, 966 F. Supp. 336, 340 (E.D. Pa. 1997).

Therefore, in accordance with the above memorandum decision,

Order

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant Francisco Jiminez's Motion for Judgement of Acquittal (Docket No. 100) and Defendant Adrian Lopez's Renewed Motion for Judgment of Acquittal (Docket No. 101) are converted to Motions for New Trial pursuant to Fed. R. Crim. P. 33 and said motions shall be, and the same are hereby, GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the present date for sentencing for the Defendants of July 29, 1998, be VACATED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that a jury trial for Francisco Jiminez on Count I of the Superseding Indictment and for Adrian Lopez on Counts I and II of the Superseding Indictment shall be set for **September 21, 1998 at 1:30 p.m.**, in the Federal Courthouse in Boise, Idaho.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that sentencing for Francisco Jiminez on Count II of the Superseding Indictment shall be re-set for **August 12, 1998 at 9:00 a.m.**, in the Federal Courthouse in Boise, Idaho. The United States Probation officer assigned to this case is further directed to supplement Francisco Jiminez's Presentence Report within seven days of this decision, as to the effect of this decision on that Presentence Report.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to 18 U.S.C. § 3161(e), the

time allowed for this case to proceed to trial shall run from the date of this Order.

Dated this 27th day of July, 1998.

/s/ B. LYNN WINMILL
B. LYNN WINMILL
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CR. No. 97-0103-S-BLW

UNITED STATES OF AMERICA

v.

MANUEL SOTELO, RAMIRO ARCE,
FRANCISCO JIMINEZ AND ADRIAN LOPEZ

[Filed: Jan. 16, 1998]

SUPERSEDING INDICTMENT

(Vio. 21 U.S.C. § 846; 21 U.S.C. § 841(a) (1);
21 U.S.C. § 841 (b) (1) (A))

THE GRAND JURY CHARGES:

COUNT ONE

21 U.S.C. § 846; 21 U.S.C. § 841(a) (1);
21 U.S.C. § 841 (b) (1) (A)

From on or about a date uncertain, but by November 18, 1997, within the District of Idaho, **MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ** and **ADRIAN LOPEZ**, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the

Grand Jury, to commit an offense against the United States, that is, to possess with intent to distribute and/or distribute cocaine, a Schedule II Controlled Substance, and/or marijuana, a Schedule I Controlled Substance, all in violation of Title 21, United States Code, Sections 846, 841 (a) (1), and 841 (b) (1) (A).

COUNT TWO

21 U.S.C. § 841(a) (1) and
21 U.S.C. § 841 (b) (1) (A)

On or about November 18, 1997, within the District of Idaho and elsewhere, **MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ** and **ADRIAN LOPEZ,** defendants herein, did knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Controlled Substance, and/or marijuana, a Schedule I Controlled Substance, or did aid and abet the same, in violation of Title 21, United States Code, Sections 841 (a) (1) and 841(b) (1) (A).

Dated this 16 day of January, 1998.

A TRUE BILL

/s/ DAVID R. BECK
DAVID R. BECK
Foreperson

Betty H. Richardson
United States Attorney

/s/ KIM R. LINDQUIST
KIM R. LINDQUIST
ASSISTANT UNITED STATES ATTORNEY

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO 97-103-S-BLW

VOLUME IV

PAGES 741 THROUGH 854

UNITES STATES OF AMERICA, PLAINTIFF

v.

FRANCISCO JIMENEZ, ADRIAN LOPEZ, DEFENDANTS

JURY TRIAL

HELD BEFORE THE HONORABLE B. LYNN WINMILL

AT BOISE, IDAHO

JANUARY 15, 1999

APPEARANCES:

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Post Office Box 606
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Court Reporter: JOSEPH RODEN, C.S.R.
Boise, Idaho

[Instruction 24 as given to Jury]

* * * * *

[754] A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to the other defendant.

All of the instructions apply to each defendant unless a specific instruction states that it applies to only a specific defendant.

I will now set forth the elements of the offense charged in the superseding indictment:

The defendants are charged in the superseding [755] indictment with conspiring to possess with intent to distribute and/or distribute cocaine and/or marijuana in violation of 21 U.S. Code, Section 846. In order for a defendant to be found guilty of that charge, the Government must prove each of the following beyond a reasonable doubt:

First, beginning on or about a date uncertain, but by November 18, 1997, there was an agreement between two or more persons to possess with the intent to distribute and/or distribute cocaine and/or marijuana; and -

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership, an agreement of two or more persons to commit one or

more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or [756] perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the superseding indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same tim ıd one may become a member of a conspiracy without full knowledge of all the details

of the unlawful scheme or the names, identities, or locations [757] of all the other members.

Even though a defendant did not directly conspire with the other conspirators in the overall scheme, the defendant has in effect agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that:

First, the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy.

Second, the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired.

And three, the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is no defense that a person's participation in a conspiracy was minor or for a short period of time.

You must decide whether the conspiracy charged in the superseding indictment existed and, if it did, who at least some of its members were. If you find that the conspiracy charge did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant [758] may have been a member of some other conspiracy.

A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the

conspiracy at a time when it was possible to achieve the objective of that conspiracy.

Therefore, if you find beyond a reasonable doubt that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or the delivery of the controlled substances seized by authorities in Las Vegas, Nevada on November 18, 1997, a defendant may be found guilty of that conspiracy only if you find beyond a reasonable doubt that the defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.

On the other hand, if you find beyond a reasonable doubt that a conspiracy existed, the object of which was the possession with intent to deliver and/or the delivery of controlled substances beyond those seized by authorities in Las Vegas, Nevada on November 18, 1997, a defendant may be found guilty of that larger conspiracy only if you find beyond a reasonable doubt that the defendant joined the conspiracy, whether before or after November 18, 1997, and that he knew or had reason to know of the scope of the larger conspiracy and embraced its objective.

[759] An act is done knowingly if the defendant is aware of the act and does not act or fails to act through ignorance, mistake, or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that a defendant committed the

crime of conspiracy, unless you find that a defendant was a participant and not merely a knowing spectator. A defendant's presence may be considered by the jury along with other evidence in the case.

* * * * *

Supreme Court, U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01-1184

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANCISCO JIMENEZ RECIO and
ADRIAN LOPEZ-MEZA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1184

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND
ADRIAN LOPEZ MEZA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Thomas A. Sullivan, C.J.A. Counsel on behalf of respondent Adrian Lopez-Meza, respectfully files this opposition to the United States of America's Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 258 F.3d 1069, and is appended to the Petition for Certiorari.

STATEMENT

On the date in question, November 18, 1997 at 1:18 a.m., police arrested two men (Sotello and Arce) who were riding in a truck near Las Vegas, Nevada, which contained marijuana and cocaine. With Arce's cooperation, agents came up with a plan to transport the truck to Nampa, Idaho, and leave it at a location which Arce initially claimed was the

destination. The truck and its load spent all day, November 19, 1997, under surveillance in Nampa, and finally, after several calls were made between Arce and unknown persons in which Arce explained where the truck was parked, Lopez and Recio appeared and Recio drove the truck away while Lopez followed in a car, almost 48 hours after the load was seized.

Lopez was charged with conspiracy to possess a controlled substance with intent to distribute and with actual possession of a controlled substance with intent to distribute. The indictment is at Appendix D of the Petition for Writ of Certiorari. Lopez was convicted at trial and filed a Motion for Judgment of Acquittal, arguing that the specific conspiracy plead in the indictment charged that Lopez joined the conspiracy prior to November 18, 1997, and that under United States v. Cruz, 127 F.3d 791 (9th Cir. 1997), the government was required to prove this fact and that they did not.

The District Court converted that motion to a Motion for New Trial and granted the same. The United States filed a Motion to Reconsider Grant of New Trial. (See Appendix B to this Brief). In that motion, the government took the following position:

> The United States does not dispute the basic and general conspiracy law upon which the Court has made its decision, namely, that a conspiracy is deemed to continue 'until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy.' United States v. Castro, 972 F.2d 1007, 112 (9th Cir. 1992). However, the United States does take exception to the specific application of the case of United States v. Cruz, 127 F.3d 791 (9th Cir. 1997). That case is simply not applicable, but has been directly relied upon by the Court in focusing on the defeat of the object of the conspiracy as the

pivotal issue in deciding these post-conviction motions. **At the same time, the United States agrees with the essential formulation of the primary issue, namely, whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18.'** (Memorandum Decision and Order, page 4.)

The anatomy of the Cruz case can be stated in three component parts. First, that conspiracy was limited by the indictment and the evidence to five named individuals. Second and similarly, that conspiracy was limited by the indictment and the evidence to the single load of narcotics transported from California to Guam. Third, the Defendant Cruz was indisputably not involved prior the seizure of the drugs, but was recruited afterwards. Those post-seizure activities, though perhaps constituting a conspiracy, would necessarily have constituted a new conspiracy not charged in the indictment, all by virtue of the defeat of the limited object of the conspiracy with the seizure of the narcotics.

The composition of the case at bar is distinct.

First, the conspiracy charged in the Superseding Indictment is much broader and not limited to the four named Defendants.

***

In short, though the November 18 load served as an evidentiary springboard at trial,

the Superseding Indictment and the trial evidence proved a conspiracy broader than and whose overall object exceeded that single load.

Thirdly, and unlike Cruz, the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to the November 18 seizure in Nevada. The Court acknowledges this in finding, as a matter of law, that the evidence was 'sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs.' (Memorandum Decision and Order, page 5.) Thus, there is no need to consider whether or not Jiminez and Lopez were members of new conspiracy subsequent to the seizure of the drugs. **Unlike Cruz, they were clearly members prior to that seizure.** [Emphasis Added]

Upon re-trial, the government dismissed the charge of possession with intent to distribute as to Lopez, proceeding only on the conspiracy charge. The District Court adopted the United States' argument, set forth above, into its jury instruction, Instruction No. 24, which stated:

> A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy.
>
> Therefore, if you find that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or

> delivery of the controlled substance seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that conspiracy if you find beyond a reasonable doubt that that defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.
>
> On the other hand, if you find beyond a reasonable doubt that a conspiracy existed, the object of which was the possession with intent to deliver and/or the delivery of controlled substances beyond those seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that larger conspiracy only if you find beyond a reasonable doubt that the defendant joined the conspiracy, whether before or after November 18, 1997, and that he knew or had reason to know of the scope of the larger conspiracy and embraced its objective.

At the jury instruction conference, the United States voiced no objection to Instruction No. 24 in regards to the two alternative conspiracy theories it contained or the elements thereof. (Appendix D).

The jury convicted Lopez of conspiracy, without specifying which theory was adopted.

On appeal, the Ninth Circuit Court of Appeals held that the evidence presented by the United States was insufficient to convict Lopez of either of the two theories of conspiracy set forth in Instruction No. 24. On appeal, the United States argued that a reasonable inference from known facts demonstrated that Lopez was involved "well before the seizure" of the drugs, because his "post-seizure behavior not only corroborated his pre-seizure activity . . . but, in and of itself, suggested prior involvement" and "[m]oreover, those

same facts show a pre-existing conspiracy that involved much more than the single load as evidenced by the quantity of narcotics involved, the organization, communication patterns and structured activities." (Appendix F). The Court of Appeals was not convinced with the United States' proof:

> The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court stated that "Lopez's and [Recio's] words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jiminez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using pre-paid calling cards.
>
> This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jiminez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the pre-paid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls upon Lopez-Meza's card were made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations . . . .
>
> * * *
>
> On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue

> the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers hired at the last minute. Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jiminez Recio retrieved the truck–the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendant's were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.
>
> The government also relied on an additional broader conspiracy theory to circumvent Cruz on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. Cf. United States v. Umagat, 998 F.2d 770, 773-774 (9th Cir. 1993)(minor role of defendants in single transaction does not permit imputed liability for the broader conspiracy). Therefore, this theory too hinges on proof of prior involvement . . . .
>
> Ultimately, however, we remain unpersuaded . . . .
>
> As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a. "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the

dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

The United States now petitions for a Writ of Certiorari, objecting to the influence that United States v. Cruz had on the prior proceedings. Again, neither in District Court nor in the Ninth Circuit Court of Appeals on direct appeal to the panel who issued the decision, did the United States take the position that Cruz should be overturned.

REASONS FOR DENYING THE PETITION

The history and prior proceedings of this case clearly show that the Ninth Circuit Court of Appeals simply made a determination that the evidence presented was insufficient to sustain a conviction for conspiracy, as charged and instructed to the jury. Petitioner chose the language and manner of the indictment's charge, and voiced no objection to the manner in which the District Court instructed the jury on that charge.

Petitioner asserts that this case squarely presents the legal issue of the viability of the ruling of law in United States v. Cruz, 127 F.3d 791 (1997), cert. denied, 522 U.S. 1097 (1998). This is not so.

As set forth above, although Cruz was relied upon by the trial court in formulating a jury instruction and by the Ninth Circuit Court of Appeals, Plaintiff/Petitioner United States of America did not ever challenge the viability of the Cruz decision in District Court or on direct appeal before the Ninth Circuit panel. Rather, Petitioner always took the position that the United States could and did convict Lopez by proving that Lopez joined the conspiracy on or before November 18, 1997, which was the date of the seizure of the

load of drugs and which was the manner that the conspiracy was plead in the indictment: "From on or about a date uncertain, **but by November 18, 1997**, within the District of Idaho, Manuel Sotelo, Ramiro Arce, Francisco Jiminez and Adrian Lopez, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the Grand Jury to commit an offense . . . to possess with intent to distribute and/or distribute cocaine . . and/or marijuana." Importantly, Lopez' physical involvement with the load was nearly 48 hours after the November 18, 1997, 1:18 a.m. seizure. The United States argued to the jury that their proof showed that Lopez became a conspirator before November 18:

> And then on the 14th [of November, 1997] we see the entry of another individual. We see the entry of Mr. Lopez, another one of the defendants, as he is using his calling card contacting an individual or individuals at New Acres. In and of itself, an innocuous event, but when we realize the significance of the New Acres number, when we realize the significance of Mr. Lopez' activities, when we realize the significance of the subsequent events involving his calling card, we realize that now Mr. Lopez, by virtue of the phone tolls we see, that he is starting to participate in the preparation for the load being brought back from the Phoenix area.

March 20, 1998 Tr. p. 1019; Appendix A.

> What's happening on the 15th in the meantime? . . . Mr. Lopez is calling Chicago, the same numbers that Mr. Sotelo is calling, once again talking to the Chicago connection--now that Mr. Sotello is going down to pick up the narcotics—to make sure that there is the communication telling each other they're

going down to get it. It will be coming back soon.

March 20, 1998 Tr. pp. 1023-1024; Appendix A.

And if you'll look here on 11-17, the first entry we have is Mr. Lopez—of course, not on this trip. He's back in the Nampa-Caldwell hub area calling Chicago. Why is he calling Chicago? They're waiting for the load to come back. Today's the day it's going to be coming back.

And then at 12:17 Mr. Lopez is calling New Acres. Again there's the New Acres connection, the loads coming today.

March 20, 1998 Tr. p. 1029.

In some conspiracy trials, that's not the case, but in this one it is. Why? It's because on November 18 at 1:18 in the morning, the narcotics . . . was seized by the authorities there. If the scope of the conspiracy was just that one load, then it ended there . . . if it ended there, then the conspirators . . . had to have been involved before it was seized . . . .

January 15, 1999 Tr. pp. 762 - 763; Appendix E

From pp. 780 - 784 of Appendix E, the Prosecutor's closing argument focuses upon the ultimate theory of the case: That Lopez joined the conspiracy long before November 18 (just as plead in the indictment) and the conspiracy was greater than one load, negating the importance of the date of joinder.

Upon re-trial, District Court gave a jury instruction

which would allow the jury to convict Lopez if it were proven that Lopez joined a single-load conspiracy prior to September 18, 1997 at 1:18 a.m. (the time of seizure), or if the government proved that Lopez joined a greater conspiracy which involved more drugs than the single load, regardless of whether Lopez joined before or after November 18, 1997 at 1:18 a.m. This jury instruction, Appendix D, met with the government's approval and they argued for conviction under both of those alternatives. The government never argued, or preserved for review, the concept that it was prevented from arguing the proper theory of conspiracy. Again, in District Court Petitioner stated "[T]he United States does not dispute the basic and general conspiracy law upon which the Court has made its decision, namely, that a conspiracy is deemed to continue "until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy" and "the United States **agrees with the essential formulation of the primary issue, namely, whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18.**" (Appendix B) The United States strenuously argued that "the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to" November 18. (Appendix B)

In the Ninth Circuit, the government again argued that the facts they proved supported a conviction under either or both of the alternatives. (Appendix F). The government never argued that the instruction, which was based on Cruz, was erroneous.

The holding of the Ninth Circuit Court of Appeals is that there was insufficient evidence to convict Lopez or Recio of joining the conspiracy prior to November 18, 1997, the date plead in the indictment and presented to the jury without objection, and that there was insufficient evidence to support a conspiracy that extended beyond the scope of the load that was seized.

Therefore, the Petitioner is asking this court to grant certiorari on a case where the United States was allowed to argue its theory of the case to the jury, given in the form of jury instructions to which the government did not object, which were entirely compatible with the charging language of the indictment, and where the Ninth Circuit Court of Appeals found that there was insufficient evidence.

The Petitioner is trying to create a disputed legal issue where there was none below. The Petitioner is asking this Court to grant certiorari on a case whose holding is limited to the sufficiency of evidence to support a conviction as charged.

Several aspects of this case and Cruz are quite pivotal to a proper understanding of why the Ninth Circuit opinion in this case in no way undermines the capacity of the United States to bring wrongdoers to justice. In Cruz, the Court of Appeals specifically limited its holding to the facts of the case before it and the specific conspiracy charged by the government. "Cruz may well have been a member of some other conspiracy, but it was not the conspiracy charged in the indictment . . . However, it was factually impossible for Cruz to have been a member of that conspiracy because Balajadia and Taitano had been arrested and drugs seized before he was even invited to join [and thus] at most, Cruz may have been a member of a new conspiracy between himself, Mesa and Tenorio [but] that conspiracy was not charged in the indictment." 127 F.3d at 795, n. 4. In this sense, Cruz is simply an extension of the law of multiple conspiracies, as instructed in this case in Instruction No. 23 in Appendix C. "[I]f you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy".

In Cruz, although the Court of Appeals held that the facts did not support a conviction for the conspiracy charged, the Court did find that the facts supported a conviction of Cruz for a different offense, attempted possession of a controlled

substance, 127 F.3d at 797, and the court upheld that conviction. Nothing in Cruz prevents the government from pursuing similar charges against Lopez-Meza for possession or attempted possession of a controlled substance, or embarking upon a conspiracy after the load was placed for pick up at Karcher Mall. There is no crisis of law here. It is a simple matter of the prosecuting attorney selecting and pleading a charge that is supported by the facts and then proving that charge beyond a reasonable doubt.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. It does not meet the criterion of Rule 10. The holding of the Ninth Circuit is limited to a review of the sufficiency of the evidence to support a conviction for the specific conspiracy charged in this case, reflected by a jury instruction based on the United States' pleadings and argument and to which no objection was lodged by the petitioner.

Respectfully submitted,

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APPENDIX A

Government's Motion to Reconsider Grant of New Trial, filed August 7, 1998, Tr. Pp. 1-8

CLOSING ARGUMENT

MR. LINDQUIST: Your Honor. Agent Hinton, Mr. Chavez, Mr. Ratliff, Mr. Sullivan, ladies and gentlemen of the jury. Before I begin, Mr. Fica, would you distribute those among the members of the jury?

Ladies and gentlemen, I'm asking that Exhibit 64 once again be distributed to you so that I might utilize it as an aid in these closing remarks.

First, a couple of preliminary remarks. Your presence here is greatly appreciated and necessary. I hope you realize that. I hope you realize that your time has not been ill spent, regardless of the verdict. Regardless of the outcome, we're here seeking the truth, and you play such a vital role in that.

We're all mindful of the sacrifice that you have made, and it's greatly appreciated that you have made those sacrifices. Secondly, my purpose in addressing you now is not to patronize you. I fully recognize that each of you is just as bright as I, and that collectively you are 13 times brighter than I.

I also recognize that you are 13 times more able to remember the facts than I. However, because we've spent a week, because there are some substantial number of facts, and because I have a responsibility in representing the People of the United States, I want to impose on you just for a little longer to allow me to summarize for you what I say that we have heard and seen over the course of this week.

It has all been presented within the context of the law, a segment of the law, the law of conspiracy and the law of possession with intent to distribute. In spite of, sometimes, our tendency as lawyers to complicate the law, it really is quite simple and straightforward. Conspiracy, as His Honor has instructed you, is an agreement. It's an endeavor between or among a number of people to do something illegal – in this case to transport, possess with intent to distribute cocaine

and/or marijuana. That's the law of conspiracy.

And the second charge is in addition to it. The actual possession of those substances with the intent to distribute is a second offense. And what again is the distinction? I mentioned that in my opening statement to you. Knowing that the endeavor exists and entering into it. Knowing that that endeavor exists is enough to constitute the violation of conspiracy without more. That's conspiracy law.

If, in the course of realizing that conspiracy, there is an actual transport, there is an actual possession of a narcotic with the intent to distribute, then the second violation has occurred. That's the law. That is the context within which all of the information had been presented to you.

Now, as to that information, would you take a look at this Exhibit No. 64? You know that it begins on November 12 as far as its date, but you also know that the testimony began on November 18 with the stop of the vehicle in Nevada by Trooper Owens and by Officer McIlroy.

Though the testimony, though the evidence started on the 18th, you now know that the conspiracy was well in progress long before that truck was stopped near Las Vegas. And I'd like you to recall something that Trooper Owens said that really explains the significance of the events portrayed in this document as of November 12.

Remember what he said? He said, "I recognized the significance of this vehicle ultimately after stopping it," after talking about the reasons that he stopped it. Ultimately he started asking those questions – "Do you have something in this vehicle? May I search this vehicle?" – because he saw something by virtue of his training. He knew something by virtue of his training. And what did he tell you?

He knew that this vehicle, by a statement made by Mr. Sotelo and Mr. Arce, was coming from Phoenix, a narcotics origin or source city, and that it was traveling north to the

Nampa—Caldwell area, what he referred to as a hub area, an area from which narcotics are further transported and distributed around this part of the country.

Now, compare that statement with what you're seeing here on this particular document. As of the 12th, three days before Mr. Arce and Mr. Sotelo left the Nampa—Caldwell area to go down to Arizona – Mexico ultimately – to bring the load of narcotics back, what was happening?

Mr. Sotelo was contacting individuals or an individual in Chicago. The Chicago connection. The transport, the finance. This conspiracy involves Chicago, and Mr. Sotelo as of the 12th is already contacting those individuals with regard to the fact that what? That he will shortly be going south to Mexico and Phoenix in order to pick up a load of narcotics. How do we know that? Because we know that these same numbers are called later on in direct relation to the events of picking up the truck, though later, and we'll talk a little bit more about that in just a moment.

That's what took place on the 12th. Mr. Sotelo was already making the arrangements. He's already – we're already seeing that what Officer Roselle Owens ultimately saw is true. This was happening. From Nampa—Caldwell, Chicago was being contacted. That area as
a hub is being demonstrated by these telephone calls. It continued on the 13th as Mr. Sotelo made three more calls to Chicago, as the circumstances in the arrangements became more concrete and more finalized, and once again anticipating his traveling down to Mexico and Phoenix in order to pick up the narcotics.

And we also see another telephone call on the 13th which further substantiates those preparations. He contacts Roberto Ybarra, one of the individuals that ultimately he physically personally makes contact with on the way down and on the way back in conjunction with picking up the narcotics. What's happening here?

Arrangements are being made already. Arrangements are being made already. And then on the 14th we see the entry of another individual. We see the entry of Mr. Lopez, another one of the defendants, as he is using his calling card contacting an individual or individuals at New Acres. In and of itself, an innocuous event, but when we realize the significance of the New Acres number, when we re[illegible]ze the significance of Mr. Lopez's activities, when we re[illegible]ze the significance of the subs[illegible]t events involving his calling card, we realize that now M[illegible]opez, by virtue of the phone tolls we see, that he is starting to participate in the preparation for the load being brought back from the Phoenix area.

At this particular time on the 14th and the evening of the 14th, Mr. Arce enters the picture. You remember the testimony of Mr. Arce? He told you that he had known Mr. Sotelo for a period of time; that by virtue of activities between them he owed Mr. Sotelo some money, and on this evening Mr. Sotelo came to him, asked him to do a number of things. He asked him to come over to his house to take a young lady home, which he did. Why did Mr. Arce tell you that? So that you could see that he was telling you the details of what truly happened. Did it make sense? It made sense.

He told you that later on he was asked to meet Mr. Sotelo to help get at vehicle started. The cables were already there. He went and did that. Why did he give you that detail? So that you could see in your mind's eye that these events were really happening. Mr. Arce isn't making this up. This really happened. He went and did that. And then he came back. And remember one little detail that he said when he went to pick the girl up to take her home, that Mr. Sotelo told him that he was expecting an important telephone call and he didn't want anyone else to hear it.

What kind of telephone call? This kind of telephone call, the telephone calls that were being made in order to arrange for this load of narcotics to come up. Now, Mr. Arce was already, albeit unwittingly at that time, participating in

that as he took the young lady home.

They got the vehicle started, and Mr. Arce came back to his house. As he was going into his house. Mr. Sotelo drives up and proposes to him that he go with him to Arizona. Now, it was more than a proposal that he go with him. He essentially told Mr. Arce that he had to go with him; that if he did he would forgive the debt that he owed him, but that if he did not, he would take his car, Mr. Arce's car.

In conjunction with that discussion, it was made clear that Mr. Sotelo was going down to get narcotics. Mr. Arce knew that, but he was between the proverbial rock and the hard place. If he didn't go down he was going to lose his car, and I think you sensed the earnest attitude of Mr. Arce, his belief that he was going to truly lose his car by virtue of that debt if he didn't participate.

And he participated. He agreed to do it in order to foreclose – in order to prevent the loss of his car. Mr. Sotelo went away. Mr. Arce was there at his home for a while. A short time later Mr. Sotelo comes back and picks him up. In the meantime, Mr. Arce has put together a few clothes, puts it in a plastic grocery sack, and they leave.

Now, prior to that time Mr. Arce's understanding is that they're going to take a blue truck down, but as they go over to a house where they're picking up the vehicles, Mr. Sotelo's house, the blue truck isn't there. The information to Mr. Arce is that the blue truck has already gone down, but the white truck is there, the same white truck that ultimately they are arrested in.

You heard about the luggage. You heard him telling you about how they took the luggage, the four pieces, and put it into the truck and they headed down. That's all happening there on the evening – on the evening of the 14th and going into the early morning hours of the 15th.

What did he tell you that happened? He told you that they traveled down through Jackpot and they stayed in Jackpot for a while and gambled, and that from there they proceeded on after a few hours toward Phoenix.

What's happening on the 15th in the meantime? Now enters another individual, as portrayed by the phone records, that starts to participate in the conspiracy. Mr. Jiminez is now involved calling New Acres. What's happening? Now, the individuals involved know that Mr. Sotelo is on his way down to pick up the load, and they're starting to talk in order to formalize and make sure that the arrangements were made, including Mr. Jiminez.

Once again, this entry would be innocuous, perhaps insignificant, in and of itself were it not for the subsequent events involving Mr. Jiminez, involving his pager, involving his calling card. But you see here, by virtue of what other people are doing, Mr. Jiminez and others are already starting to communicate. All right.

They're going down to get the load. It will be coming back soon. That same day Mr. Sotelo – well the next entry, we see something that's very interesting. During the course of the trial you've heard about the term "corroboration." Mr. Arce said that they were going from Las Vegas down toward Phoenix in that area after they'd traveled a significant period of time. Mr. Sotelo called his girlfriend in Vale, Oregon. You heard that girlfriend testify, and she said that she was in Vale, Oregon, and there is the phone toll indicating that that call was made.

At the same time or shortly thereafter, Mr. Lopez is calling Chicago, the same numbers that Mr. Sotelo is calling, once again talking to the Chicago connection -now that Mr. Sotelo is going down to pick up the narcotics – to make sure that there is the communication telling each other they're going down to get it. It will be coming back soon.

And then we see toward the bottom of page one, we see a number of telephone calls to Roberto Ybarra, to Ramon Perez. That's totally consistent with two things. It's totally consistent with what Mr. Arce told us as far as what was happening as they traveled down, as Mr. Sotelo was communicating with other individuals involved in this endeavor – Roberto Ybarra and Mr. Ramon Perez.

It also shows that other people are indeed involved. In other words, Mr. Sotelo was telling them, "I'm coming down. We're bringing the truck down. Be ready to receive us. This is the truck that you're going to put the narcotics in. Get ready. Get ready for us. We're coming down so that we can leave the truck. We'll go about our business. We'll come back and pick it up."

And the phone calls established both of those things. Turn over to the next page. There we see more phone calls to Ramon Perez, to Roberto Ybarra. Three calls to Roberto Ybarra, one more to Ramon Perez, again substantiating what Mr. Arce told us about Mr. Sotelo making phone calls on the way down, and also establishing the fact that the endeavor is becoming even more firmed up as far as getting ready for the truck to come down.

They arrive, according to Mr. Arce, there in the evening. What does he tell us? That they arrive in Phoenix pursuant for these phone calls; that Ramon Perez is supposed to meet them at a particular exit by a particular store. They go to that store. Mr. Sotelo tells Mr. Arce to park that truck in a handicapped parking spot. Do you remember that testimony? Why did had Mr. Arce tell you that? Once again, to show you the detail, his recollection of what was actually happening.

He told you that he resisted that. It's a handicapped parking spot, and Mr. Sotelo got a little bit firm with him, upset, and said, "Park it there. Do what you're told to do." And so the white truck was parked there. Who was waiting for them? Ramon Perez. Ramon Perez picks them up in the

white Cadillac.

What's happening here? The truck that's going to be filled with dope in Phoenix, the source city, according to Roselle Owens, is now being left so that that can happen, and members of the conspiracy are together.

Ramon Perez takes them back to the house. How we do know that Ramon Perez is a member of the conspiracy? First of all, he picks them up there. He's receiving telephone calls from Mr. Sotelo on the way down. He's there waiting for them. He's aware of the truck. He's aware of what's going on. And as they drive over there over to the house of – not Ramon's house but Roberto Ybarra's house, what do we hear about? We hear about firearms, we see a .45 brought out and a discussion about .45s and .357s.

And when they finally get to the house what does Mr. Sotelo pull out of his bag but a machine gun with a silencer, and they talk about those things. And you see that that's consistent with what's happening here. A truck has been left to be filled with a substantial amount of cocaine and marijuana, and the people involved doing it are talking about firearms and machine guns. They have those weapons with them, totally consistent with the testimony that you've heard that firearms frequently do go with drugs, particularly in these amounts.

Shortly thereafter, they're there at Mr. Ybarra's house, what do they find? The blue truck, the same blue truck that Mr. Arce told us about, and interestingly enough, one of the witnesses that testified under direct examination, Juan Barroso, he talked about a '62 Impala and a blue truck being taken down.

What did Mr. Arce say he saw there behind the house but the blue truck and the '62 Impala. Mr. Arce is telling us the truth. It's been corroborated as he goes along. They transfer the luggage. They get into the -they get into that blue truck and they head to Mexico. All of this is happening. Of

course, we have to read between the lines.

There on the evening of the 16th and then as we go into the 16th, what do we see? We see a whole series of telephone calls. First of all, we see that Mr. Lopez is making a telephone call at 12:45 to Chicago. Why are we getting a call made to Chicago? It's one of those daily calls that Mr. Lopez is making to Chicago because the truck had been delivered. It's being loaded. It's going to be on its way back shortly, and they're reporting to that connection.

Then we see a whole – then we see four calls here from Mr. Sotelo to the pager. This is compadre. This is the person that's responsible for getting the truck full of dope. Now that Mr. Sotelo has left the truck there in Phoenix to be filled with dope by compadre, he's talking to compadre as they go down, making sure it's taken care of, making sure it's done right because he's got an errand to do in Mexico, totally consistent with what Mr. Arce told us as they traveled down.

What does Mr. Arce tell us? That they arrived at the border at 3:30. So right after the 1:51 a.m. call, they're arriving at the border a couple of hours later, 3:30. They go across the border. They go to a motel, and who do they find there but what is reported to Mr. Arce as the wife of Mr. Sotelo, Norma.

The two of them, Mr. Sotelo and his wife spend the night in the motel. Mr. Arce sleeps in the car. What does he tell us. He said he woke up about 10:30. He went up to the motel room, knocked on the door, and nobody was there. That was the morning of the 16th. So he went back to the car. He waited. He fell asleep, goes back to the motel room at three o'clock, knocks on the door, still no one there.

Mr. Sotelo and Norma had left to go someplace, do something. We don't know. He goes back to the truck, comes back at six o'clock, knocks, and no one's there. Finally, he just goes back to the truck, figures -just resigns himself to the fact that he's going to have to spend the night, and he spends the evening of the 16th there until the following morning.

Norma's knocking on the door saying, "Wake up." He goes up to the motel room. They give him something to eat because he hadn't eaten for a substantial period of time. They allow him to shower. And then what do they do? They head to Hermosillo all together in the blue pickup truck. What happens in Hermosillo? Why am I telling you all this?

Mr. Arce is relating these details to you. Does it make sense to you that this is just all fabricated, or is this truth in his mind? It makes sense, and it seems to be corroborated by the corollary facts that we have here. They go to Hermosillo. They stop by an aunt's place, a relative of Mr. Sotelo, ten minutes. Then they go to the center of town. They leave the blue truck.

They stop there, and they're eating, and Mr. Sotelo and Norma leave in the blue truck and then Mr. Sotelo comes back alone. We don't see Norma again. Mr. Sotelo comes back alone on foot. They take a taxi to the bus station. They buy a ticket. Mr. Arce buys tickets, given the money by Mr. Sotelo. They take the bus up to Nogales.

They cross the border on foot. They get a bus there, and they're heading across, and this is all happening, you see, between the last entry of 11-16 and 11-17. Mr. Arce tells us that they got – the moment that they crossed the border, about 15 minutes, as they were in the taxi going from the border back to Phoenix.

Why were they going back to Phoenix? To pick up the truck loaded with the dope. Fifteen minutes in route. Mr. Sotelo is on the telephone talking to Compadre, and if you'll look here on 11-17, the first entry we have is Mr. Lopez – of course, not on this trip. He's back in the Nampa-Caldwell hub area calling Chicago. Why is he calling Chicago? They're waiting for the load to come back. Today's the day it's going to be coming back.

And then at 12:17 Mr. Lopez is calling New Acres. Again there's the New Acres connection, the load's coming

today. It's going to be coming today. Let's be ready, and Mr. Jiminez is calling New Acres. Load's coming. Let's be ready today. Is that in and of itself significant? No. But later on we see Mr. Lopez and Mr. Jiminez showing up to pick up the load. And then look at 12:44.

Mr. Arce tells us that they got to the border, they left the border at about 12:30, and he said at 12:15 Mr. Sotelo was making the call to that pager number talking to Compadre, and there it is. Mr. Sotelo is talking to the Arizona pager, who is Compadre, and now we have the series of telephone calls with Compadre, Roberto Ybarra, Ramon as they go up to Phoenix to pick up the truck that's now being loaded or had been loaded with dope.

We see an entry there on the next page of 5:47 p.m. What's so significant about that entry? A phone call to Juan Manuel Gutierrez. Mr. Arce said that when they arrived at Casa Grande, Mr. Sotelo had the taxi driver take them to Casa Grande. They got to Ramon's house, and he wasn't there, and they couldn't find him, so they walked up the street to whose house? Juan Manuel's house.

This telephone call by Mr. Sotelo seems to corroborate what Mr. Arce is telling us as far as that is concerned and then we see more phone calls here to the Arizona pager to Compadre. What for? Once again making sure that the truck is ready. And what did Mr. Arce say was the gist of these conversations? "Is the truck ready? Is it ready to go?" Are we just talking about repairing the brakes? Are we just talking about repairing lights, some mechanical thing? No. The truck is being filled with dope, and Mr. Sotelo was making sure that the truck is ready. He wants to leave right away to take it back. The last entry is at 7:38.

Mr. Arce tells us that they arrived in Phoenix in the evening, got the truck and headed out as Ramon Perez had taken them to Phoenix. Is it coincidence that Ramon Perez is taking them to Phoenix to pick up this truck? No, it's not coincidental. Ramon Perez is part of this endeavor, so they go

to Phoenix. They're at Exit 51. They pick up the truck and they head out. They go to Las Vegas and they're stopped in Las Vegas. They're stopped in Las Vegas.

What happens there? You remember the statement of Mr. Arce? At first Mr. Arce tells us that he met Mr. Sotelo in a casino. Why is he lying? He himself told you why he was lying. He said, "I was scared." He made up a lie. What's Mr. Sotelo saying? Mr. Sotelo is saying, "Oh, we just went down, picked up a truck, took a truck down and now we're bringing a truck back."

Do you realize the significance of what's happening here? Is it clear to you that Mr. Sotelo, as between the two of them, was the leader? Mr. Sotelo was dominating. Mr. Sotelo was the one who made it that Mr. Arce was there by virtue of the debt and taking the car and so forth.

Mr. Sotelo was telling Arce what to do. Mr. Sotelo was the leader. Mr. Sotelo was in the know. Mr. Sotelo was knowledgeable, and what he told law enforcement at that point in time was a partial truth. Was it true that they had taken the car down south to Mexico? Yes. Was it true that they'd brought a truck back? Yes.

But it was only a partial truth. Mr. Arce, not the leader, wasn't thinking quickly enough to come up with that partial truth. He provided a lie. But then later on, very interestingly – whoops. The officers tell us that all a sudden Mr. Arce is telling the same story as Mr. Sotelo, a partial truth. And then Mr. Arce tells us how that came about, because Mr. Sotelo got together with him between the time they were arrested and when they were brought to Idaho and told him what? "Just tell them what I'm telling them. Just tell them what I'm telling them so that we have consistent stories."

And what else did he tell him? "If you get a chance, run because if I get a chance, I'm going to run." And that was the setting as they went to Idaho. You know the rest, as far as

how the truck was brought to Idaho and all of the efforts that were made as far as the sting, the controlled deliver, and you see what was going to happen there.

Let's go back to this and remind ourselves what's happening here. On the 18th at 9:46 they have been arrested. The load isn't there. Had they not been arrested, according to the testimony of Agent Hinton, the load would have been arriving in Idaho about this time. It's not there. It's not arriving. And what do we see on the phone tolls? Mr. Lopez is calling New Acres, and what's being said here? You're entitled to infer what's going to be said here.

What's being said here on this conversation is, "The load's not here. We don't know what's going on. We're starting to be concerned." And then at 5:07, later on in the evening, now that it's really certain that the load has not arrived, we've got Mr. Lopez calling and saying, "We got problems. The load has not arrived."

Then on 11-19, what's happening? This is the day of the sting. This is the day of the controlled delivery. See from the telephone tolls how the members of the conspiracy are concerned the load has not arrived. That prompts these telephone calls, the calls to Chicago and they're out looking. You see the calls at 12:29 p.m. They're calling Chicago at 12:31, 12:32, 12:35. They're trying to figure out what's going on, what's happening here.

And Mr. Lopez, at the top of page 4, is calling Chicago once again as the communication is hot and heavy. Why. Because the load hasn't shown up. And then at 7:27 we don't see a lot of communication between 1:20 and 7:27. There's nothing. And at 7:27 the UC call is made and that generates a whole slew of calls involving Mr. Lopez, involving the pagers and all kinds of locations. Pay particular heed to those locations. What's happening here? Mr. Lopez and Mr. Jiminez –

THE COURT: Just a moment. We're having a technical problem. All right. Proceed.

MR. LINDQUIST: The UC call generates a great deal of activity because in the UC call they're told the truck has now been left at the Karcher Mall. Reflect on the locations of these calls from pay phones. Mr. Jiminez – or excuse me – Mr. Lopez, his calling card call is being made at the Circle K and at various places right around the Karcher Mall.

What's going on here? What's happening here is not that they're looking for the truck. They know where the truck is. What's happening here is that they know that the truck is a day late, and they know that that might suggest not only difficulties, but the fact that perhaps law enforcement is involved. Perhaps it had been discovered.

What's going on here is surveillance. You've got these individuals, in effect, on both ends of the Karcher Mall as far as the main highway there watching. That's why, when they get that pager number, when they get

APPENDIX B

Government's Motion to Reconsider Grant of New Trial, filed August 7, 1998, Tr. Pp. 1-8

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Criminal No. 97-103-S-BLW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA

vs.

MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ, ADRIAN LOPEZ,

Defendants.

GOVERNMENT'S MOTION TO RECONSIDER GRANT OF NEW TRIAL

The United States of America and Betty H. Richardson, United States Attorney for the District of Idaho, through Kim R. Lindquist, Assistant United States Attorney, ask the Court to reconsider its decision of July 27, 1998, wherein it granted a new trial for Defendant Jiminez as to Count One, and Defendant Lopez as to both Counts One and Two. This request is based upon the following reasoning:

The United States does not dispute the basic and general conspiracy law upon which the Court has made its decision, namely, that a conspiracy is deemed to continue "until there is affirmative evidence of abandonment,

withdrawal, disavowal or defeat of the object of the conspiracy." United States v. Castro, 972 F.2d 1107, 1112 (9th Cir. 1992). However, the United States does take exception to the specific application of the case of United States v. Cruz, 127 F.3d 791 (9th Cir. 1997). That case is simply not applicable, but has been directly relied upon by the Court in focusing on the defeat of the object of the conspiracy as the pivotal issue in deciding these post-conviction motions. At the same time, the United States agrees with the essential formulation of the primary issue, namely, whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18." (Memorandum Decision and Order, page 4.)

The anatomy of the Cniz case can be stated in three component parts. First, that conspiracy was limited by the indictment and the evidence to five named individuals. Second and similarly, that conspiracy was limited by the indictment and the evidence to the single load of narcotics transported from California to Guam. Third, the Defendant Cruz was indisputably not involved prior the seizure of the drugs, but was recruited afterwards. Those post-seizure activities, though perhaps constituting a conspiracy, would necessarily have constituted a new conspiracy not charged in the indictment, all by virtue of the defeat of the limited object of the conspiracy with the seizure of the narcotics.

The composition of the case at bar is distinct.

First, the conspiracy charged in the Superseding Indictment is much broader and not limited to the four named Defendants. Indeed, that document refers to others "both known and unknown," but similarly involved in the conspiracy. Moreover, the evidence presented at trial substantiated the same. Beyond the four named Defendants and over the course of the travel from Idaho to Arizona and Mexico and back to Idaho through Phoenix, other conspirators were clearly revealed: the wife of Defendant Sotelo; Ramon Perez; Roberto Ibarra; the individual known as

"Compadre"; and others. Additionally, at the time of the "sting" in Idaho, the three initiating telephone calls revealed the voices of three distinct individuals, all clearly involved in the conspiracy. And finally, the toll records introduced into evidence showed additional contacts in the Chicago and Idaho/Oregon areas. Indeed, the evidence showed that Defendant Lopez, after retrieving the narcotics, called another individual or individuals at New Acres, Idaho, thereby further confirming the multiplicity of conspirators beyond the four named in the Superseding Indictment.

Similarly, the Superseding Indictment was not limited in its language to the load of marijuana and cocaine seized on November 18. Although clearly including the seized load, that charging document refers to a conspiracy that had been ongoing from a date uncertain up to and including November 18, 1997, the general object of which was to possess with intent to distribute and/or distribute cocaine and/or marijuana, as reflected, but not limited, by the November 18 load.

This, too, was supported amply in the evidence presented at trial; that is, that the conspiracy charged and proved, with regard to its object, predated and was much broader than the November 18 load in its structure, organization and implementation. To be sure, the evidence at trial focused on the November 18 load, but always within the context of the ongoing conspiracy with its overall drug distribution objective.

Beginning with Defendant Arce's recruitment, that pre-existing and ongoing conspiracy was demonstrated. The methodology associated therewith was confirmed by the way the vehicles were initially moved from Idaho to the Phoenix area, involving a number of co-conspirators beyond the named Defendants. The organization reflected by the communications scheme, involving cellular telephones and beepers, confirmed that broad, pre-existing structure. The way meetings took place in Phoenix on the way south, including the discussion of firearms, demonstrated a well-

entrenched organization much broader than the November 18 load alone. The fact that, upon meeting co-conspirators in the Phoenix area, Defendant Sotelo drove vehicles there and otherwise knew where the co-conspirators lived and where he was going showed vividly that this was not the first time that narcotics had been moved by the organization. Indeed, Defendant Arce testified that at one point Sotelo discussed with a co-conspirator by telephone the very parking lot in the Phoenix area where they were to meet and where they had met before. The cellular telephone dialog prior to picking up the flatbed truck in the Phoenix area showed a pattern and methodology established far beyond the events of November 18. Indeed, the very nature of the flatbed truck, with its hidden compartments and the boards and screws worn by numerous removals, confirm that pre-existing breadth and structure. The registration of the flatbed truck and the vehicle used to pick up their narcotics by Defendants Jiminez and Lopez showed clearly a pre-existing structure and methodology in the transportation of narcotics. Moreover, the fact that Jiminez, at the time of his arrest, was carrying non-owner car insurance further corroborated the pre-existing and well-thought-out structure of the overall narcotics trafficking scheme. The way Defendants Jiminez and Lopez behaved in surveilling the truck before picking it up demonstrated the same, as well as the route and manner they employed in leaving the area once the truck was obtained. Moreover, the communications by telephone before and after the pickup, involving all of the named Defendants and others and as substantiated by the toll records, provided powerful proof of the nature and breadth of the overall conspiracy charged. The instantaneous communication from cooperating Defendant Arce, through co-conspirators in Phoenix and ultimately to Defendants Jiminez and Lopez, confirmed again the nature of the conspiracy, together with the identical calling cards possessed by Jiminez and Lopez and the fact that they were calling co-conspirators in Phoenix long before the seizure of the narcotics took place in Nevada. Finally, the fact that no purchase money was carried by or seen with Sotelo throughout the course of the entire trip indicates a sophisticated, pre-arranged methodology of which

the November 18 load was merely one event.

In short, though the November 18 load served as an evidentiary springboard at trial, the Superseding Indictment and the trial evidence proved a conspiracy broader than and whose overall object exceeded that single load.

Thirdly, and unlike Cruz, the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to the November 18 seizure in Nevada. The Court acknowledges this in finding, as a matter of law, that the evidence was "sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs." (Memorandum Decision and Order, page 5.) Thus, there is no need to consider whether or not Jiminez and Lopez were members of a new conspiracy subsequent to the seizure of the drugs. Unlike Cruz, they were clearly members prior to that seizure.

It follows from the foregoing that, given the broad, ongoing nature of the conspiracy, the overall object of that conspiracy was not defeated and did not end with the seizure of the November 18 load. Thus, even if Defendants Jiminez and Lopez had joined the conspiracy after that seizure, they would still have been joining the same ongoing conspiracy with its general object intact. This legal and evidentiary reality, coupled with the proof of prior involvement by Jiminez and Lopez, obviates the need for any preseizure instruction to the jury.

Thus, the case at bar is much more akin to the Mason case cited in Cruz, wherein there was clearly evidence of conspiratorial involvement prior to the seizure of particular narcotics. (Reference is also made here to the initial response by the United States to the Defendants' Motions.)

In any event, the Court in its Memorandum Decision and Order, at page 4, properly states the issue as to whether or not "there was sufficient evidence introduced at trial for a

rational trier of fact to find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18." The Court answers that inquiry in the affirmative by declaring at page 5 that, "construed in a light most favorable to the Government, [the evidence] is sufficient to support a jury's finding, beyond a reasonable doubt, that Jiminez and Lopez were members of the conspiracy, and that their membership in the conspiracy predated the seizure of drugs."

It is then respectfully suggested that the Court errs in speculating beyond this finding that the jury might have found that

APPENDIX C

Jury Instruction Nos. 23/24 – January 15, 1999

Instruction 23

You must decide whether the conspiracy charged in the superseding indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Instruction 24

A defendant may only be found guilty of the conspiracy charged in the indictment if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy.

Therefore, if you find that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or delivery of the controlled substances seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that conspiracy if you find beyond a reasonable doubt that that defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.

On the other hand, if you find that a conspiracy existed, the object of which was possession with intent to deliver and/or delivery of controlled substances beyond those seized by authorities in Las Vegas, Nevada, on November 18, 1997, a defendant may be found guilty of that conspiracy if you find beyond a reasonable doubt that that defendant understood the scope of the conspiracy and embraced its object beyond the possession and/or delivery of the controlled substances seized by authorities on November 18, 1997.

APPENDIX D

Jury Instruction Conference - January 15, 1999
Tr. pp. 741 - 742

PROCEEDINGS

JANUARY 15, 1999

THE COURT: For the record, we'll now reconvene the formal jury instruction conference in United States versus Jimenez and Lopez. Before I ask Counsel to state their objections to the Court's proposed charge to the jury, I will indicate that yesterday the Court provided Counsel with a set of proposed jury instructions, numbered 1 through 27. We then conducted an informal off-the-record conference to discuss the concerns that Counsel may have had with the Court's proposed charge. At that time certain concerns were expressed concerning proposed instruction 24, which is the Court's attempt to instruct the jury on the legal principles embodied in the decisions of United States versus Cruz, 127 F.3d, 791 and United States versus Umagat, 998 F.2d, 770.

Based upon the concerns of Counsel, the Court made revisions and revised Instruction 24 to Counsel this morning and heard one further objection from Government in which the Court considered and made a slight modification to the instruction. The Court has now provided Counsel with a final set of instructions, numbered 1 through 127. Now there are, in addition, about 6 other instructions which the Court will read after Counsel completes their closing arguments and immediately before the jury begins their deliberations. Those are stock Ninth Circuit Instructions concerning how to deliberate, reminding the jury of a need for a unanimous verdict and things of that sort. I will ask Mr. Fica to provide you with a copy if you want to see those, but they are completely stock Ninth Circuit instructions.

Counsel, now is your opportunity to state for the record any objections you may have to the Court's proposed charge. I would indicate to you that if there's any concern that you expressed yesterday during our informal session that you want made part of the record, you'll need to restate that concern at this time because those proceedings were informal and off the record. Mr. Lindquist?

MR. LINDQUIST: Thank you, Your Honor. The only concern that I would express is what I mentioned this morning. Instruction No. 24, the very last clause of Instruction 24 after the comma following 199', recognizing the Court's having adjusted that, I still feel thatthat clause is superfluous, otherwise adequately covered by Instructions 21 and 22. Otherwise, I have no objections.

THE COURT: All right. Mr. Shurtliff?

MR. SHURTLIFF: No objection, Your Honor.

THE COURT: Mr. Sullivan?

APPENDIX E

Closing Argument of Kim Lindquist –
January 15,1999
Tr. pp. 760 – 767; 780 - 784

jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the verdict form which sets forth the verdict upon which you agree. You will then return with your verdict to the courtroom.

We'll now hear the closing arguments of Counsel after which I will give you a few brief closing instructions. Mr. Lindquist?

MR. LINDQUIST: Your Honor, thank you. Ladies and gentlemen, first just a couple of comments before I address the evidence that you have received during the course of this week. First of all, thank you for being here. i don't say that to patronize you.. I hope one of the things that you have seen throughout this week is the marvelous blend of the law and lawyers and folks from the community in trying to arrive at the truth, perhaps cumbersome at times, perhaps a bit bewildering at times. But, nonetheless, I hope you have at least an impression of the magnitude of our system in trying to blend lawyers with folks that aren't lawyers in finding the truth. Your role is so important. If you weren't here, that system simply couldn't work. And it shouldn't work without you because of that.

Secondly, my comments as to the evidence that you have received is not meant to patronize you either. I fully acknowledge that each one of you is just as right as I, just as capable of understanding and appreciating the evidence that has come from that witness stand. And I recognize that, collectively, you're 14 times more able than I to do that very thing.

My purpose is to simply underscore, reiterate, give you the perspective of the United States as far as the evidence is concerned. If you find that helpful, it's yours. If you find it unhelpful, disregard it because those determinations are yours.

What I would like to do first is to perhaps comment just briefly on the law as Judge Winmill has just given it to you. I preface that by saying that the instructions that he has read to you, that you have in your hands, prevail. Those are the instructions that you must follow. I'm always trying to simplify for my own purposes. I'm always trying to reduce things to the most common denominator so that I might better instruct you as to my impressions, the perception of the United States as far as the evidence is concerned. So what I would like to do is just show you – and if I might turn on the machinery, Your Honor.

THE COURT: You may.

MR. LINDQUIST: Again, this is my hen scratching, but perhaps it can be of help to you. It's going to be of help to me as I discuss the facts with you. We are talking about conspiracy, and the essence of what Judge Winmill has just read you is that you must make five inquiries. There are five essential questions that must be asked and determined beyond a reasonable doubt in your deliberations.

What's the first inquiry? The first inquiry is, Do we have a drug conspiracy? And a conspiracy is simply defined as a group of people involved together in distributing drugs. That's the first determination that you have to make: Does the evidence show a drug conspiracy as that's defined? Does the evidence show a group of people joined together distributing drugs? That's the first inquiry.

What's the second inquiry? What is the reach of the scope of that conspiracy? Now, why do we have to ask that secondly? In some conspiracy trials, that's not the case, but in this one it is. Why? It's because on November 18 at 1:18 in the morning, the narcotics, the load coming up from Nevada, was seized by the authorities there. If the scope of the conspiracy was just that one load, then the conspiracy ended as of November 18 at 1:18 in the morning. If the conspiracy, the scope, the reach of that conspiracy, is just that one load, then it ended there. And that determination will, in turn, determine

your inquiry thereafter. If it ended there, then the conspirators, as Judge Winmill has just instructed you, had to have been involved before it was seized as to that one load. If they joined afterwards, they can't be part of that conspiracy. Why? Because the conspiracy ended when the load was seized if the conspiracy was limited to that one load.

But what if that, what if the conspiracy wasn't just limited to that one load? What if the conspiracy was broader than the one load, included loads before the load that came up on November 18, and anticipated other loads afterwards? If that's the nature of the conspiracy, if that's the reach of the conspiracy, then it doesn't matter that the load was seized on November 18 at 1:18 in the morning as far as who joined when. If the conspiracy was bigger and encompassed more than just that one load, then the conspirators could have joined before that load was seized or after that load was seized.

So as far as determining when and if the conspirators joined, you're going to have to decide what was the reach of the conspiracy. Was it limited to just the one load? Or did it encompass more than the one load, loads before that one, anticipating, perhaps, loads after that one? That is the second determination.

Once that second determination is made, the same inquiries continue. The third inquiry – and by the way, the inquiries are the same on both sides of the chart, whether as to conspiracy A, which is limited to the load, or conspiracy B, if you will, which is greater than the load. The third inquiry you have to ask is, Did the defendant become involved? As far as the single load, if you find that the conspiracy was just the single load, you have to ask, Did this particular defendant become involved in that single load conspiracy? And as part of that determination, When did he become involved? And in order to be guilty, when does he have to have joined that conspiracy? Before the narcotics were seized on November 18 at 1:18 in the morning because after that, a single load conspiracy no longer existed. It had been defeated by the

Government, by the officers in Las Vegas seizing the narcotics.

So if your determination on number 2 is that the conspiracy we have here was limited to the single load, you have to determine, Was the defendant involved? And if he was involved, when did he become involved? And it must have been before that load was seized.

On the other hand, if you determine that the conspiracy was broader, encompassed more than just that one load, you also have to determine if the defendant became involved, but it doesn't matter when he became involved. It could have been before the narcotics were seized in the one load or after because the conspiracy encompassed far more than just the one load.

What's the fourth determination that you have to make? Did the defendant know, or reasonably should have known, of the reach of the conspiracy? In the left-hand column, if the conspiracy was limited to a single load and you find that the defendant was involved in that load and that the defendant became involved before it was seized in Nevada, you have to determine, Is there proof beyond a reasonable doubt that that defendant knew or had reason to know of the load?

If the defendant did know of the load, if the defendant had no knowledge or reasonably shouldn't have known, was just an innocent spectator, an innocent bypasser, if you will, he can't be guilty. But if the facts show beyond a reasonable doubt that the defendant was indeed involved, joined the conspiracy as to the one load before that load was seized and knew or reasonably should have known of that load what was happening there, then four-fifths of the inquiry cry out for guilt.

If, on the other hand, you have determined that the conspiracy is broader than the one single load, the inquiry is exactly the same, but it's geared toward the scope of that

broader conspiracy. Did the conspiracy encompass more than just that one load? Was it bigger than just the one load? If so, did the defendant become involved? And it doesn't matter when the defendant became involved if you find that the defendant became involved. But at the same time, the evidence must show that that defendant knew or reasonably should have known of the reach of the conspiracy beyond just one load. If the evidence shows that, then that determination is for guilt.

And what is, finally, the fifth inquiry? Did the defendant intend to help? Whether the conspiracy you find is limited to a single load or encompassed more than that one load, in addition, it must be found that the defendant intended to help.

So, in summary, assuming that you find that this conspiracy simply encompassed the one load, in order for each defendant to be found guilty, what must be proved beyond a reasonable doubt? That there was a drug conspiracy; number 2, it was limited to just the one load that was seized; the defendant joined that conspiracy, became involved in the conspiracy; the defendant joined or became involved before the narcotics were seized; the defendant knew that it was a load of narcotics as part of his involvement; and the defendant intended to help. If the evidence shows beyond a reasonable doubt that that's the case, the defendant is guilty. If one of those elements is missing, you must acquit. That's the burden that's placed on the United States, one that we willingly accept.

Now, what's the alternative theory? Is there a drug conspiracy? Yes. What is the reach of that conspiracy? Did that conspiracy involve just more than this one load, loads before this, anticipating loads after? If that's what you find, the next inquiry, Did the defendant become involved in that? It doesn't matter when he joined, so long as you find that he became involved. Did he know or have reason to know that this conspiracy involved more than just this one load? And, secondly, Did he intend to help? Those are the two

alternative tracks that you can take legally as far as this evidence is concerned.

Then I just put down here, as long as the foregoing, as long as either one of those two tracks is proved beyond a reasonable doubt, that involvement may be relatively minor or for a relatively short period of time. As long as you find that there was a conspiracy, the reach of that conspiracy, that the defendant became involved in that conspiracy, that the defendant knew or had reason to know of the reach of that conspiracy, and that the defendant intended to help, with those factors proved beyond a reasonable doubt, the participation can be 11/15, or the next page, goes from 11/15 to 11/16. What's happening? The whole top of this page, you see what is happening. As they travel south to Arizona, Sotelo is talking to the Arizona contacts. And you can just follow the cellular regional reflections here as they travel south to Phoenix. . They're going down with the empty white bed truck. They are going to be dropping it off. And isn't it interesting that as they are going down, not only is Sotelo talking to the contacts in Arizona, but Sotelo is in touch with the cellular phone connected with Elizabeth Rayo. Who's that? It's Mr. Lopez. It's Mr. Lopez here, here, and here. Is it coincidental that he's talking to Mr. Lopez? No, because Mr. Lopez knows that they are going to go down; they are going to be bringing the load back, and he's going to play his integral role up here once it comes back.

Now, I put an asterisk by Mr. Lopez's name over there, and I will tell you why. How do we know for sure that this is Mr. Lopez? Take a look at this phone call right here. Here's Mr. Lopez using the 273 card at this number. That's the number, that's the residence number listed to Elizabeth Rayo at her house. And so here we have Lopez at the house of Elizabeth Rayo. Here we have Lopez at the house of who? Mireya Alvarez, because remember, Elizabeth Rayo left her cellular telephone with Mireya. There is Mireya at that house and Lopez is using his card there. So on the 16th, Lopez is using his card there at the house of Mireya Alvarez. Mireya says that he was there using the cellular telephone. Well, here

he is using her phone there, and the day before, he was using the cellular telephone. It's Mr. Lopez, and you can conjecture until you're blue in the face that it wasn't Mr. Lopez. It was Mr. Lopez. What's happening at this point in time, or what people do we have involved? Sotelo, Ybarra, Perez, Lopez, Valladarez, essentially the same people that make up the conspiracy.

Next page, and I'm moving quickly because I only have so much time. This page embarks November 16 through, well, through November 17. What's happening here? Now Sotelo and Arce are going south to the border. Sotelo keeps talking to Arizona to fine tune the loading of the white bed, the flatbed truck that has been left there. At 3:30, according to Arce, they get to the border, and they spend the night there in Nogales. They start back the following day from Hermosillo. After having left the truck in Hermosillo, they go back by taxi and bus to the border, and you can: look at the tickets in evidence at 8:45 in the morning. So at 8:45 in the morning of the 17th, Sotelo and Arce are headed back, headed back to Phoenix to pick up the truck that will have been loaded with drugs to take back to Idaho. And, once again, isn't it interesting that at the very moment that Sotelo and Arce are headed back to Phoenix to pick up the truck that now will be loaded with drugs, what the phone tolls show as far as activity, Mr. Lopez using his 595 card to talk to Roberto Valladarez in Chicago and where is he calling from? The Indian Creek Mobile Home Estates. And if you remember, Ms. Alvarez said that she moved out of that when she moved over to the Elizabeth Rayo residence, and when she moved out, who moved in? Mr. Lopez moved in. So who's using the phone card at that residence? Mr. Lopez. And, coincidentally, right at the time that the white flatbed truck is going to be picked up in Arizona to bring the dope back.

The next entry, Lopez once again, who is he talking to? Nu Acres. That's where the dope was going to be headed. And who else enters the picture once again or reveals himself once again? Mr. Jimenez using his 130 call talking to whom? Nu Acres, the place that the drugs were going to go. Why are

Lopez and Jimenez talking to these people now? Because they are the ones that are going to be receiving this when it comes up wherever it was supposed to be delivered and do something with it, distribute it, deal with it, and they are staying in the loop. They are checking in. The rest of the calls show Sotelo and Arce going to Phoenix and picking up the white flatbed truck. All of these calls show that happening as they go north to Phoenix to pick up the truck.

It continues over on November 17 with Sotelo and Arce picking up the truck. And we know, according to Mr. Arce's testimony, that in the evening of November 17, they left Phoenix, they picked up the flatbed truck, left there in the parking lot with the keys in the ashtray, now full of dope, and they are headed north to Idaho, but through Las Vegas. And what happens on the 18th at 1:18 in the morning? They are stopped in Las Vegas by the officers and the narcotics are seized, and the sting aspect of the operation begins.

Now, let's just stop right there. Given the instructions that the Judge has given you, if this conspiracy only had to do with the one load, if this conspiracy only had to do with this one load, and nothing more, the pertinent question here, Did these two gentlemen, were they involved before that dope was seized there in Las Vegas at 1:18 in the morning on the 18th? And the answer from the phone tolls alone is, yes, yes, they were part of the group. They were part of the Idaho connection in conjunction with Arizona and Chicago, and there were communications among them. But I think you can also see that the conspiracy wasn't limited to just this one load. It was pre—existing, but nonetheless, they were still part of it. They were still part of it, and that they had become involved.

Interestingly enough as we have seen previously, now we know that the flatbed truck is headed to Idaho full of dope. And what does the phone traffic start to reflect? Bingo, there's Mr. Lopez talking to Nu Acres where the dope is supposed to be taken. Is that just coincidental, just happened to be talking to a sweetheart at that time? No, it is part of the

drug transaction. He's part of the Idaho connection to receive it.

Now, I made a little notation here that says at approximately 12:00 the load was expected. That's according to Agent Hinton's testimony. It takes about 12 hours to get from Las Vegas to Idaho,. so it should have been expected at about 12:00. At this particular call, he's anticipating that it should be arriving, but by 5:07 when he is talking to Valladarez in Chicago, it's late. It's late, and the traffic reflects that it causes a worry because what do we have now? On the following day, we have got Lopez trying to contact Chicago. What's going on here? Something is wrong, something is wrong, the dope is not here; it's late; something happened, what's going on?

APPENDIX F

Appellate Brief of the United States of America
in the Ninth Circuit
Tr. pp.17 - 19

USCA No. 99-30145

USDC (Idaho) No. 97-103-S-BLW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

-vs-

ADRIAN LOPEZ-MEZA,
Defendant/Appellant.

BRIEF OF APPELLEE

On Appeal from the United States District Court
for the District of Idaho
Honorable B. Lynn Winmill District Court Judge

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Exhibit 64, p.5.) The evidence also established that Jose Meza paid for the phones and the rent where Lopez lived. (GER, second trial, pp.440-451.)

A DEA agent testified to the general characteristics of a large drug organization as they related to the specific facts of this case, and provided the opinion that the

organization reflected by the case at bar was such and would necessarily have involved other transactions and loads besides that seized in Nevada. (GER, second trial, pp.617-648.)

III

ARGUMENT

Restatement of Issues

A. Did the District Court Err by Refusing to Grant Appellant's Motion for Judgment of Acquittal after the First Trial?

Appellant relies on the case of United States v. Cruz, 127 F.3d 791 (9th Cir. 1997), for the proposition that once the drugs were seized in Nevada the conspiracy ended, assuming the conspiracy was limited to that single load. Given such, the Cruz case establishes two factual possibilities as far as the evidence is concerned: (1) that the conspiracy was limited to the load seized and ended when the narcotics were seized in Nevada on November 18, 1997, with Appellant and co-defendant Jimenez having joined the conspiracy before said seizure; or (2) that the conspiracy embraced more than the one load, allowing Appellant and co-defendant Jimenez to have joined either before or after said seizure.

The evidence at the first trial clearly supported a finding that Appellant was part of the conspiracy, whether he joined before or after the seizure of the load in Nevada. In the first instance, the evidence clearly supported a finding that, if the conspiracy consisted of many participants beyond the defendant's charged but only the narcotics seized in Nevada, Appellant joined the conspiracy prior to the seizure. At the same time, the same evidence supported a finding that the conspiracy consisted of more participants than the defendants charged and more narcotics predating the seizure of those seized in Nevada, thereby accommodating Appellant's joinder at any time before or after said seizure. A

restatement of the facts is unnecessary to eiterate the evidence and reasonable inference therefrom that, even if the conspiracy were limited to the load as seized, Appellant was involved well before that seizure. Indeed, his post-seizure behavior not only corroborated his pre-seizure activity reasonably inferred from the telephone traffic, but, in and of itself, suggested prior involvement. Moreover, those same facts show a pre-existing conspiracy that involved much more than the single load as evidenced by the quantity of narcotics involved, the organization, communication patterns and structured activities. Taking the evidence in a light most favorable to the Government, the Trial Court was on firm ground in finding, in essence, that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt under either of the Cruz scenarios.

However, the Court reasoned that it was possible that the jury only believed and found that Appellant and co-defendant Jimenez joined the conspiracy after the seizure of the single load of narcotics in Nevada, without the Court having instructed them as to the Cruz ruling Hence, the Court ordered the new trial. Nonetheless, the evidence was still sufficient for a rational trier of fact to find guilt as to the conspiracy beyond a reasonable doubt under either of the Cruz possibilities.

In this regard, Appellant's argument (Appellant's Brief, pp.15-19) constitutes, in essence, closing argument or the defense interpretation of the evidence. The arguments fail to preclude the reasonable inference taken by the Trial Court and the firm basis provided by that reasoning in denying the judgment of acquittal. Moreover, the case of United States v. Galvan, 693 F.2d 417 (5th Cir. 1982), is not controlling legally and is factually distinguishable. The Galvan decision is limited to evidence of telephone calls. The case at bar not only involve telephone activity but specific and observed behavior which more than amply substantiated the participation in the conspiracy that went far beyond mere association.

Opposition Brief not available For Filming at this time

No. 01-1184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND ADRIAN LOPEZ-MEZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 01-1184

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND ADRIAN LOPEZ-MEZA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondents do not defend the court of appeals' holding on the merits. Nor do they dispute that it conflicts with black-letter principles of conspiracy law and reinforces a conflict in the circuits. Instead, they argue that the government did not properly raise the question presented below, and that the court of appeals' holding does not significantly obstruct enforcement of federal criminal law. Those contentions are incorrect, and this Court's review is warranted.

1. The petition for certiorari presents the question whether a conspiracy automatically terminates when law enforcement authorities frustrate its objective. In *United States* v. *Cruz*, 127 F.3d 791 (1997), cert. denied, 522 U.S. 1097 (1998), the Ninth Circuit held that the seizure of drugs whose distribution is the object of a conspiracy automatically terminates the conspiracy. In

this case, the court of appeals applied that rule and held that, because there was insufficient evidence that respondents either joined the conspiracy before the seizure of the drugs or participated in a conspiracy with broader goals not limited to delivery of the particular cocaine that was seized, respondents' conspiracy convictions had to be reversed.

The rule announced in *Cruz* and applied in this case is contrary to the established principle that the duration of a conspiracy depends on the conspiratorial agreement, not the factual possibility or likelihood that it will achieve its objective. See Pet. 10-12 (citing, *inter alia*, *Salinas* v. *United States*, 522 U.S. 52, 64, 65 (1997); *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957); and *Osborn* v. *United States*, 385 U.S. 323, 332-333 (1966)). The *Cruz* rule also squarely conflicts with the First Circuit's decision in *United States* v. *Belardo-Quiñones*, 71 F.3d 941 (1995), which upheld a defendant's conviction on facts indistinguishable from those here and expressly rejected the rule adopted by the Ninth Circuit in *Cruz* and applied here. See Pet. 12-13. More generally, the Ninth Circuit's holding that "impossibility" terminates a conspiracy conflicts with decisions of at least five other courts of appeals. See Pet. 14-15.

Respondents do not contest that the Ninth Circuit's decisions in this case and in *Cruz* conflict with the basic principles of conspiracy law discussed above. Respondents also do not contest that the Ninth Circuit's decision in this case conflicts with the First Circuit's decision in *Belardo-Quiñones* and the legal rulings of the other five courts of appeals cited in the petition. For those reasons, certiorari is warranted in this case.

2. Respondents do contend that the government "did not ever challenge the viability of the *Cruz* decision in District Court or on direct appeal before the Ninth Circuit panel." Br. in Opp. 8. That contention provides no basis for denying further review.

a. In *United States* v. *Williams*, 504 U.S. 36, 41 (1992), this Court made clear that its ordinary practice does not preclude review of a question if it was "pressed *or* passed upon" by a court of appeals (emphasis added). In *Williams*, this Court reversed a court of appeals' holding that the government had to present exculpatory evidence to a grand jury. The court of appeals had adopted that requirement in an earlier case "over the protests of the Government, but in a judgment that was nonetheless binding precedent for the panel below." *Id.* at 44. Although the government in *Williams* itself did not expressly argue to the court of appeals that its earlier precedent was incorrect or should be overruled, the Court explained that the government's failure to raise the validity of the earlier circuit precedent was no bar to this Court's review of the rule underlying that precedent.

The Court rejected as "unreasonable" the proposition "that a party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection, and even though no 'intervening developments in the law' had occurred." 504 U.S. at 44 (citations omitted). To the contrary, the Court explained that "[i]t is a permissible exercise of [the Court's] discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of

that precedent." *Id.* at 44-45. The Court has adhered to that principle in subsequent cases. See, *e.g.*, *United States* v. *Vonn*, 122 S. Ct. 1043, 1046 n.1 (2002); *United States* v. *Wells*, 519 U.S. 482, 487-488 (1997).

b. The same principle is controlling here. As in *Williams*, the court of appeals in this case expressly relied on the rule that the government challenges in the petition for certiorari. The court of appeals began its discussion with a statement of the *Cruz* rule, see Pet. App. 2a-3a, and then framed the question presented as whether there was sufficient evidence to support respondents' convictions under that rule. See *id.* at 3a ("[W]e must determine whether any rational jury could find * * * that [respondents] were involved in the conspiracy prior to the initial seizure of the drugs."). The court rested its reversal of respondents' conspiracy convictions squarely on its conclusion that there was insufficient evidence to satisfy the *Cruz* rule.

In addition, as in *Williams*, the government in this case vigorously challenged the rule that is at issue here "as a party to the recent proceeding [*i.e.*, *Cruz*] upon which the lower courts relied for their resolution of the issue." 504 U.S. at 45. Indeed, the government not only argued to the panel in *Cruz* that the rule it adopted was mistaken, but also unsuccessfully sought rehearing en banc in that case.[1] Moreover, the government again unsuccessfully sought rehearing en banc in this case on the question whether the *Cruz* rule should be abandoned.[2]

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[1] As reflected on the Ninth Circuit's docket, rehearing en banc in *Cruz* was denied on January 23, 1998.

[2] The government's petition presented that issue as the first question presented. See Pet. on Reh'g 5 ("Whether a conspiracy to distribute narcotics terminates as a matter of law when the narcotics are seized by law enforcement agents."). The first argument heading in the petition stated: "*Cruz*, which dictated the outcome in the present case, flies in the face of black letter conspiracy law and conflicts with decisions in this and other circuits." *Id.* at 9. The responses to the petition for rehearing argued that the *Cruz* rule was correct. Respondent Lopez-Meza's first argument heading was: "*Cruz* should not be overturned." Lopez-Meza Response to Pet. for Reh'g 3. The first sentence of respondent Recio's response stated that "[t]he Petition has little to do with these Appellants and much to do with the Government's view of *United States* v. *Cruz*" and then recognized that "[i]n that regard, the Government argues that *Cruz* is not good law." Recio Response to Pet. for Reh'g 2. The responses did not contend that the government had in some way forfeited the opportunity to challenge the *Cruz* rule. Moreover, Judge O'Scannlain's dissent from denial of rehearing en banc plainly recognized that the validity of *Cruz* was properly before the en banc court and strongly urged that *Cruz* should be overruled. See Pet. App. 46a-58a.

As in *Williams*, the government has never "concede[d] * * * the correctness of th[e] precedent" challenged in the petition for certiorari. 504 U.S. at 45. Although the government argued to the panel of the court of appeals in this case that respondents' convictions could be sustained even under *Cruz*, that argument was based on the proposition that *Cruz* was governing circuit precedent; the government did not concede that *Cruz* was correct.[3] Accordingly, the

[3] As respondents note, the government did state in the district court that it "*does not dispute* the basic and general conspiracy law upon which the [District] Court has made its decision, namely, that a conspiracy is deemed to continue 'until there is affirmative evidence of abandonment, withdrawal, disavowal or *defeat of the object* of the conspiracy." Br. in Opp. 11 (emphasis added). That statement reflected the fact that the district court could not overrule or disregard *Cruz*. Respondents also correctly note that the government informed the district court that it "agree[d] with the

question presented in the petition is properly before the Court, and respondents' argument to the contrary should be rejected.

c. Respondents observe (Br. in Opp. 8-9) that the jury was instructed to make findings under a *Cruz* theory in order to return a verdict of guilty. The instructions in this case provide no basis for denying review. The jury was instructed that, in order to find guilt, it had to find all of the elements of a conspiracy under settled, pre-*Cruz* law. See Pet. App. 73a-75a. It was also instructed in accordance with *Cruz*, that "[a] defendant may only be found guilty * * * if he joined the conspiracy at a time when it was possible to achieve the objective of that conspiracy." *Id.* at 75a-76a. In particular, the jury was instructed that to find guilt it had to make one of two findings. The jury was told it could find guilt under a "larger conspiracy" theory if it found that the objects of the conspiracy embraced drug trafficking "beyond [the] * * * controlled substances * * * seized by authorities * * * on November 18, 1997" and respondents "knew or had reason to know of the scope of the larger conspiracy and embraced its objective." *Id.* at 76a. Alternatively, the jury was told it could find guilt on a "preseizure conspiracy" theory if it found that the conspiracy's "sole object" was trafficking in the drugs that were seized on November 18 and respondents "joined or became * * * member[s] of the conspiracy prior to" the time and date of seizure. *Ibid.*

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essential formulation of the primary issue, namely whether 'a rational trier of fact [could] find that [respondents] were members of the conspiracy prior to the seizure of the drugs.'" *Ibid.* That indeed was the correct formulation of the primary issue, under *Cruz*, that the district court had to decide.

The court of appeals held that the evidence was insufficient to support either the "larger conspiracy" or the "pre-November 18" findings and reversed respondents' convictions on that basis. If this Court holds that neither of those findings was necessary, however, respondents' convictions should be affirmed. Neither the "larger conspiracy" nor the "preseizure conspiracy" instructions were necessary under a correct understanding of conspiracy law, and any failure of proof on the theories embodied in those instructions would be of no moment, if this Court were to reject the *Cruz/Recio* theory. Moreover, a jury that made either the "larger conspiracy" or the "preseizure conspiracy" findings necessarily found as well that respondents participated in a simple post-seizure conspiracy. If the jury rested its verdict on a finding that respondents were members of a "larger conspiracy" whose objects involved trafficking in "substances beyond those seized by authorities," Pet. App. 76a, then the jury necessarily found at least that the conspiracy included trafficking in the narcotics that were seized. Alternatively, if the jury rested its verdict on a finding that respondents were members of the conspiracy *before* the seizure, the jury necessarily based that finding at least in part on inferences drawn from respondents' efforts to traffic in the drugs *after* the seizure. Indeed, neither respondents nor the court of appeals suggested that there was any doubt whatever about respondents' participation in the conspiracy after the seizure, and the evidence in the case leaves no room to make any such suggestion. See Pet. 14-15.[4]

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[4] At respondents' first trial, the jury was not instructed that it had to make the findings required under *Cruz*, and it found respondents guilty. The district court found that the evidence was suffi-

In short, the verdict the jury reached—even under the incorrect instructions required by *Cruz*—necessarily included a finding that respondents participated at least in a single-load conspiracy involving the drugs that were seized. Accordingly, if the Court were to grant review in this case and agree with the government that such a finding is sufficient to support a conspiracy conviction, respondents' convictions should be affirmed.[5]

4. Respondents contend that the *Cruz* rule "in no way undermines the capacity of the United States to bring wrongdoers to justice," because under that rule the government simply must "select[] and plead[] a charge that is supported by the facts and then prov[e] that charge beyond a reasonable doubt." Br. in Opp. 12, 13. Respondents note that the holding in *Cruz* did not preclude a prosecution of the defendant there under other conspiracy charges (if such could be proved) and the holding did not preclude the defendant's conviction in that case for another, non-conspiracy offense. *Id.* at 12-13. As this case illustrates, however, the *Cruz* rule

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cient to support that conviction. Absent *Cruz*, there would have been no need for a second trial.

[5] Even if the instructional error were found to have precluded the jury from making the findings necessary to convict respondents under a correct understanding of the law, the government would be entitled to argue that the error was harmless under *Neder* v. *United States*, 527 U.S. 1 (1999), or, at a minimum that it is entitled to retry respondents under correct instructions. That would be a significant benefit to the government compared to the present judgment of the court of appeals, which entirely precludes the government from retrying respondents on the current indictment. See *Burks* v. *United States*, 437 U.S. 1 (1978) (appellate finding of insufficient evidence is comparable to an acquittal, and it precludes retrial under the Double Jeopardy Clause).

does result in the acquittal of defendants who have agreed to join a conspiracy when, unbeknownst to those defendants, the government has intervened to frustrate the fulfillment of the agreement. See Pet. 15. That fortuity is entirely irrelevant to respondents' liability under traditional principles of conspiracy law, see Pet. 9-12, and under the uniform view of the other courts of appeals that have addressed the issue, see Pet. 12-14. Further review is therefore warranted.

* * * * *

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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QUESTION PRESENTED

Whether a conspiracy ends as a matter of law when the government frustrates its objective.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 258 F.3d 1069.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2000, and amended on July 31, 2001. A petition for rehearing was denied on October 30, 2001 (Pet. App. 45a-46a). On January 18, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 27, 200. A petition for a writ of certiorari was filed on February 14, 2002, and granted on May 28, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, both respondents were convicted in the United States District Court for the District of Idaho of conspiring to possess cocaine and marijuana with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 21 U.S.C. 846. Lopez-Meza C.A. E.R. 1-2. Respondent Recio was sentenced to 126 months' imprisonment, to be followed by five years' supervised release. Recio C.A. E.R. 7-8. Respondent Lopez-Meza was sentenced to 132 months' imprisonment, to be followed by five years' supervised release. Lopez-Meza C.A. E.R. 67-68. The court of appeals reversed respondents' conspiracy convictions for insufficient evidence. Pet. App. 1a-10a.

1. On November 18, 1997, at 1:18 a.m., a Nevada police officer stopped a northbound flatbed truck occupied by Manuel Sotelo and Ramiro Arce. The police seized 369 pounds of marijuana and 14.8 pounds of cocaine. The drugs were worth between $10 and $12 million. Sotelo and Arce claimed ignorance of the drugs but said they had agreed to drive the truck to Nampa, Idaho, where they were supposed to leave the truck parked at the Karcher Mall. Pet. App. 2a, 4a, 19a, 23a.

Arce decided to cooperate, and government agents set up a sting. The following day the government transported the truck to Idaho and parked it at the Karcher Mall.[1] Arce called an Arizona pager number.

[1] The court of appeals erred when it stated that the original drivers of the truck were arrested on the same day as respondents. See Pet. App. 2a (original driver "arrested earlier that day"). In fact, the truck was delivered to the Mall, where respondents were arrested, on November 19, one day after the arrest of Sotelo and Arce. See Pet. App. 19a (Gould, J., dissenting); 3 Gov't C.A. Supp. E.R. 171 (officer's testimony that truck was placed at Karcher Mall "[o]n the 19th, around 10:00 in the morning").

When someone returned the page, Arce mentioned the truck's location to the caller, who stated that he would "call a muchacho to come and get the truck." Pet. App. 2a, 5a, 19a. About three hours later, respondents drove into the mall parking lot in a blue car and pulled up to the truck. Recio got out of the car and into the truck. Both Recio and Lopez-Meza drove west on different back roads. The agents ultimately decided to stop the vehicles, and they arrested Recio and Lopez-Meza. *Id.* at 2a, 4a, 19a.

Recio and Lopez-Meza each made false statements to the agents to explain their actions. Pet. App. 4a. Recio denied ever having been dropped off at the Karcher Mall. He said that he had been shopping and that he ran into a man who offered him $250 to drive the truck to Recio's house, where the man would pick it up later. Recio explained that he decided to take back roads instead of a much more direct route because "[he] just like[d] to drive in the country." *Id.* at 22a. Recio was carrying a pager, a phone card, and a "'non-owner' driver's insurance" policy, which covers the named insured for operation of a vehicle owned by another. *Id.* at 4a, 5a. Recio had renewed the policy shortly before the seizure. *Id.* at 5a.

When the police stopped Lopez-Meza, they smelled marijuana in the car. Pet. App. 19a. The police recovered two pagers and two phone cards from him. *Id.* at 4a, 5a, 27a. Lopez-Meza told the police that he had been "out driving around" and that he was going to see his girlfriend, whose last name and address he could not recall. *Id.* at 26a-27a.

2. On January 16, 1998, a federal grand jury returned a superseding indictment charging Recio and Lopez-Meza with conspiracy to possess cocaine and marijuana with intent to distribute them and possession

of cocaine and marijuana with the intent to distribute them. Pet. App. 69a-70a. They were each found guilty on both counts. *Id.* at 60a. Respondents filed post-trial motions for judgment of acquittal in which they argued that their conspiracy convictions were invalid under *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998). See Pet. App. 59a-68a.

In *Cruz*, the government prosecuted a conspiracy charge against Billy Cruz, a drug courier who agreed to deliver 210.7 grams of methamphetamine after the original courier, Peter Balajadia, had, unbeknownst to Cruz, been arrested with the drugs. The Ninth Circuit held that Cruz was innocent of the charged conspiracy because he joined it after the government had seized the drugs, even though Cruz, the seller, and the buyer were all unaware of the seizure. The *Cruz* court reasoned that "it was factually impossible for Cruz to have been a member of th[e] conspiracy because Balajadia and [his companion] had been arrested and the drugs seized before he was even invited to join," 127 F.3d at 795 n.4, and that the seizure had "terminated the conspiracy," *id.* at 794 n.1.

The district court in this case denied respondents' motion for judgment of acquittal, holding that there was sufficient evidence that Recio and Lopez-Meza had joined the conspiracy before the drugs were seized. The district court nevertheless decided to grant respondents a new trial on the conspiracy count, because no *Cruz* instruction was given, creating a risk that the jury had found respondents guilty based solely on their post-seizure actions.[2] Pet. App. 64a. The jury found respondents guilty of conspiracy at the second trial.

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[2] The district court granted Lopez-Meza a new trial on the possession count as well, Pet. App. 67a, but the government dismissed that count before the second trial. See *id.* at 10a n.. Recio, who was driving the drug-laden truck, did not file a motion for judgment of acquittal on the possession count. *Id.* at 60 n.1.

3. a. A divided panel of the Ninth Circuit reversed. Pet. App. 1a-10a. The majority held that the evidence presented at the second trial was insufficient. *Id.* at 10a. Relying on *Cruz*, the court viewed the question before it as "whether any rational jury could find, beyond a reasonable doubt, that [respondents] were involved in the conspiracy *prior to the initial seizure of the drugs on November 18*." *Id.* at 3a (emphasis added). The majority was unable to find any evidence that unequivocally demonstrated respondents' pre-seizure participation in the conspiracy. For example, the majority dismissed as irrelevant the evidence that respondents lied to the police officers upon their arrest, because their false statements "provide[] no basis for concluding that [respondents] were involved in the conspiracy beforehand." *Id.* at 4a; see also *ibid.* ("Nothing [respondents] said or did * * * directly links them to the pre-seizure conspiracy."). The majority also found respondents' possession of pagers irrelevant to the timing of their involvement, reasoning that

> one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers.

Id. at 5a. The panel majority concluded that the evidence suggested that respondents "were simply drivers hired at the last minute." *Id.* at 5a-6a.

The panel majority rejected the government's contention that respondents had participated in other goals of the conspiracy involving other drug shipments, even if they became involved in the November 18 shipment only after the government had seized the drugs. The court reasoned that "the limited role [respondents] played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads." Pet. App. 6a. The majority observed that "[t]he strongest evidence" of respondents' involvement in a broader conspiracy was Recio's multiple receipts for expired non-owner insurance policies, from which it could be inferred that Recio "regularly drove drug trucks for the conspiracy." *Id.* at 7a. But the majority "remain[ed] unpersuaded," because the "insurance can also be accounted for by alternative explanations," including the possibility that Recio worked as a driver for legitimate businesses. *Ibid.* The majority was also unpersuaded by the evidence indicating that Lopez-Meza lived at Nu Acres, the delivery point for the drugs, and the evidence of his links to his uncle Jose Meza, who was implicated in the conspiracy and lived at Nu Acres also. The majority reasoned that Lopez-Meza's "presence [at Nu Acres] and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute." *Id.* at 8a.

b. Judge Gould dissented. He stated his disagreement with the court's prior holding in *Cruz*:

> [F]or the reasons stated by Judge Hall in dissent in *Cruz*, I believe *Cruz* totally inconsistent with long established and appropriate principles of the law of conspiracy. Though we are now bound by *Cruz*, and the district court was correct to apply it, I believe

> that it is an ill-advised precedent that our court should overrule en banc at the earliest opportunity.

Pet. App. 21a n.2. Nonetheless, applying *Cruz*'s rule that a defendant cannot join a conspiracy after the seizure of the drugs in question, Judge Gould concluded that there was "unmistakably more than sufficient evidence in the second trial" linking defendants to a conspiracy before police officers seized the drugs on November 18, 1997. *Id.* at 18a; see *id.* at 20a-28a. Judge Gould also concluded that the government presented sufficient evidence of respondents' involvement in a larger conspiracy involving more loads than the one seized on November 18, based on their "possession and use of sophisticated drug-trafficking communication devices" and "the quantity, quality and value of the drugs seized." *Id.* at 34a; see *id.* at 29a-34a.

c. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 45a-46a. Judge O'Scannlain, joined by eight other active circuit judges, dissented from that decision. *Id.* at 46a-58a. Judge Hall, a senior judge who authored the dissenting opinion in *Cruz*, stated that she also "agree[d]" with Judge O'Scannlain's dissent. *Id.* at 58a. Judge O'Scannlain traced the court's mistake to its decision in *Cruz*:

> By failing to rehear *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2001), en banc, we let stand the aberration wrought by *Cruz* now compounded by *Recio*. In so doing, we erect serious impediments to legitimate law enforcement efforts to combat drug trafficking by mandating the exclusion of relevant, probative, and, indeed, overwhelming evidence of guilt. We also perpetuate conflict with our sister circuits and, in my view, ignore black letter prin-

ciples of conspiracy law set out for us by the U.S. Supreme Court.

Id. at 46a. Judge O'Scannlain explained that, "[i]n holding that a conspiracy endures only as long as its ultimate goal remains objectively achievable, *Cruz* imports a defense of factual impossibility into the law of conspiracy in direct conflict with the long-standing, black letter principle that impossibility is not a defense to a conspiracy charge." *Id.* at 51a.

Judge O'Scannlain stated (Pet. App. 51a-52a) that the court of appeals' recognition of factual impossibility as a defense to conspiracy conflicts with decisions of this Court, including *Salinas* v. *United States*, 522 U.S. 52 (1997), in which the Court had explained that "[a] person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense[,]" because "the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* at 64, 65. He also stated that the rule of *Cruz* and this case conflicts with decisions of other courts of appeals, including the First Circuit's decision in *United States* v. *Belardo-Quiñones*, 71 F.3d 941, 944 (1995). See Pet. App. 52a. In Judge O'Scannlain's view, "the paradoxical effect of *Cruz* and *Recio* is to exclude evidence of guilt following successful and entirely legitimate intervention by law enforcement agents." *Id.* at 50a. Applying the "fundamental principle" that the duration of a conspiracy is determined by "'the scope of the conspiratorial agreement' itself," *id.* at 57a (quoting *Grunewald* v. *United States*, 353 U.S. 391, 397 (1957)), Judge O'Scannlain found that respondents were clearly guilty of the charged conspiracy, because the agreement to transport the drugs, to which they were

parties, survived the government's seizing the drugs. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals' decision contravenes fundamental and well-settled principles of the criminal law. Decisions of this Court have firmly established that the gravamen of a conspiracy charge is the *agreement* to commit an illegal act; the crime does not require the actual commission of the offense. One reason that such an agreement poses a threat to society is that the combination of actors makes it more likely that the conspirators will have the means and persistence to attain their illegal goals and avoid detection. A conspiratorial agreement also poses risks, however, that go beyond the likelihood that the particular goals of the conspiracy will be achieved. The mere existence of groupings designed to achieve criminal ends threatens the community's safety, and conspirators are more likely to turn their attention to further and often more extreme illegal ends beyond those that initially motivated them. Because of those distinct threats posed by the criminal agreement alone, the crime of conspiracy focuses on the agreement.

In light of the settled principle that the gravamen of a conspiracy is the agreement, the success or failure of the conspiracy in achieving its criminal goal is of no consequence to the conspirators' criminal liability. A conspiracy may be formed to pursue a criminal goal that, unbeknownst to the conspirators, could not have been achieved. Similarly, facts that make an existing conspiracy's goals unlikely or impossible to achieve have no relevance to the conspirators' criminal liability. Accordingly, a long line of precedent over the past 120 years has made clear that factual impossibility—

whether it arises before or after a conspiracy is formed—is not a defense to criminal liability for conspiracy.

It follows from those principles that the court of appeals erred in the underlying premise of its decision in *Cruz* and in this case—that a conspiracy terminates when, unbeknownst to its participants, its goals are frustrated. The scope and duration of a conspiracy are determined by the scope and duration of the agreement, not by the likelihood or possibility that the conspiracy will be successful. So long as the agreement persists, the conspiracy persists. The actions that traditionally have been held presumptively to terminate a conspiracy—the success of the conspiracy in achieving its goals or the abandonment of those goals by the conspirators—are significant precisely because those actions can be expected to terminate the efforts of the conspirators to achieve their criminal goals. But so long as the conspirators continue to attempt to achieve their goals—as the conspirators undoubtedly did here after the drugs were first seized—the conspiracy itself continues.

The Ninth Circuit's holding that a conspiracy necessarily terminates when its goal has been frustrated would give those in respondents' position a windfall defense to conspiracy charges, based on facts of which they were not aware and that are entirely unrelated to their culpability for joining together to achieve a criminal end. The court of appeals did not attempt to reconcile its novel rule with the settled principles of conspiracy law, but instead stated, as the sole justification, that the court had doubts about possible entrapment of defendants by government agents mounting sting operations. The courts, however, do not have the authority to expand the entrapment defense to exoner-

ate defendants where the traditional requirements of that defense—government inducement and lack of predisposition—are missing.

The rule adopted in this case would seriously compromise the effective investigation and prosecution of conspiracies, not only in drug cases, but in terrorism and other criminal contexts in which law enforcement officials must both foil the success of the conspiratorial endeavor and bring those who are genuinely culpable to justice. The Ninth Circuit's rule would make it more difficult for law enforcement to engage in wholly legitimate "sting" operations such as the one in this case. And it would needlessly complicate the prosecution of conspiracies, by requiring cases involving an agreement to achieve a single criminal end to be treated as a series of separate conspiracies, depending on the entirely arbitrary factors of when the government acted to foil the conspiracy's objectives and the extent of proof that a given defendant had agreed to achieve the conspiratorial goals before or after any such government action.

ARGUMENT

A CONSPIRACY DOES NOT TERMINATE WHEN ITS OBJECTIVES HAVE BEEN FRUSTRATED OR BECOME IMPOSSIBLE TO ATTAIN

In *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998), and in this case, the court of appeals held that a conspiracy automatically ends when law enforcement intervenes and frustrates the conspiracy's objective. Applying that rule, the court of appeals reversed respondents' conspiracy convictions despite overwhelming evidence of their agreement to transport 369 pounds of marijuana and 14.8 pounds of cocaine and their commission of acts in fur-

therance of that agreement. The rule of law announced in *Cruz* and applied here is inconsistent with black-letter principles of conspiracy law—in particular, the fundamental principle that the gravamen of a conspiracy is the agreement and that the possibility or likelihood of a conspiracy's achieving its objectives has no bearing on the criminal liability of the conspirators.

A. The Gravamen Of A Conspiracy Is An Agreement To Accomplish An Illegal Objective

This Court has frequently explained that "the 'essence' of a conspiracy offense 'is in the agreement or confederation to commit a crime.'" *United States* v. *Felix*, 503 U.S. 378, 389-390 (1992) (quoting *United States* v. *Bayer*, 331 U.S. 532, 542 (1947)). "[T]he criminal agreement itself is the *actus reus*." *United States* v. *Shabani*, 513 U.S. 10, 16 (1994). See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."); *Braverman* v. *United States*, 317 U.S. 49, 53 (1942) ("The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts."). That principle is fully applicable to conspiracy charges under the primary federal conspiracy statute, 18 U.S.C. 371, where an overt act in addition to the agreement must be shown, as this Court made clear in cases such as *Braverman*. It is equally apt in prosecutions under 21 U.S.C. 846, where no overt act need be shown and the agreement alone is sufficient to establish liability. See *United States* v. *Shabani*, 513 U.S. 10 (1994).

The rationale for penalizing the agreement—even if the substantive offenses that the conspirators intend to accomplish do not transpire—is that "collective criminal

agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). In part, the threat to society posed by a conspiracy concerns the increased risks that the conspirators, by banding together, will be successful in attaining their goals and avoiding punishment. A criminal agreement "both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Ibid.* A conspiracy "is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

In addition, however, a conspiracy poses a social threat that goes beyond the likelihood or possibility that the conspiracy's particular objectives will succeed or be punished. "[T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." *Callanan*, 364 U.S. at 594; see *Rabinowich*, 238 U.S. at 88 (threat posed by agreement "sometimes quite outweigh[s], in injury to the public, the mere commission of the contemplated crime"). That is because "[g]roup association for criminal purposes often * * * makes possible the attainment of ends more complex than those which one criminal could accomplish," and "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Callanan*, 364 U.S. at 593-594. As one commentary has noted, "[t]he existence of a grouping for criminal purposes provides a continuing focal point for further crimes either related or unrelated to those

immediately envisaged" and "the uneasiness produced by the consciousness that such groupings exist is in itself an important antisocial effect." Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 924-925 (1959).

For those reasons, the proposition that the essence of a conspiracy is the agreement—not the actual criminal conduct committed by the conspirators—is not subject to doubt. This Court has often relied on that principle, in particular in its repeated holdings that a conspiracy is distinct—and may be punished and prosecuted separately—from the substantive crime that is its object. In *Felix*, for example, the Court held that "the conspiracy charge against [the defendant] was an offense distinct from any [substantive] crime for which he had been previously prosecuted, and the Double Jeopardy Clause did not bar his prosecution on that charge." 503 U.S. at 391-392. The Court has repeated that holding in a variety of other contexts. See *Callanan*, 364 U.S. at 593 ("The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law."); *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *United States* v. *Bayer*, 331 U.S. 532, 542 (1947); *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

B. A Conspiracy May Be Initiated And Persist Regardless Of The Factual Possibility Of Achieving Its Goal

1. Because the gist of a conspiracy is the agreement, and because such an agreement poses threats to society distinct from the specific crime contemplated by the conspirators, criminal liability for conspiracy has never depended on the successful commission of the conspirators' intended offenses. "It is elementary that a conspiracy may exist and be punished whether or not

the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas*, 522 U.S. at 65. The agreement to violate the law is "an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, * * * regardless of whether the crime agreed upon actually is committed." *United States* v. *Feola*, 420 U.S. 671, 694 (1975). See *Rabinowich*, 238 U.S. at 86 ("The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable.").

Similarly, because "the illegal agreement * * * constitutes the crime," *Hyde* v. *United States*, 225 U.S. 347, 365 (1912), the possibility or impossibility of the conspirators' actually achieving their ends is of no relevance to their criminal liability for conspiracy. See Wayne LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.5, at 85 (1986) (LaFave & Scott) ("Impossibility of success is not a defense, as criminal combinations are dangerous apart from the danger of attaining the particular objective."). It is true that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas*, 522 U.S. at 65.[3] But so long as the goal is the commission of a criminal offense, liability for conspiracy does not depend on the conspirators having adopted a likely—or even a

[3] Some particular conspiracy statutes are directed at agreements whose goal may not involve the commission of a separately defined criminal offense. See, *e.g.*, 18 U.S.C. 371 (conspiracy to defraud the United States); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). Absent such a prohibition in the statute, however, the object of the crime of conspiracy must be an illegal act.

possible—means to achieve their objective. As a leading treatise summarizes, "the conspiracy cases have usually gone the simple route of holding that impossibility of any kind is not a defense." LaFave & Scott § 6.5, at 92.[4]

2. Factual impossibility has never been recognized as a defense to conspiracy charges. The crime of conspiracy can be traced at least to an English statute enacted in 1285 to prohibit false prosecutions. See Percy Henry Winfield, *The History of Conspiracy and*

[4] The courts' flat rejection of impossibility as a defense to conspiracy charges contrasts with their generally more complex treatments of impossibility, and of various types of impossibility, as defenses to attempt charges. The difference is accounted for by the fact that attempt offenses focus on the risks of the completed crime and require a "dangerous proximity to success," while "the essence of the conspiracy is being combined for an unlawful purpose—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose." *Hyde* v. *United States*, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting); see *State* v. *Moretti*, 244 A.2d 499, 502 (N.J.) ("[A] conspiracy charge focuses primarily on the Intent of the defendants, while in an attempt case the primary inquiry centers on the defendants' Conduct tending toward the commission of the substantive crime."), cert. denied, 393 U.S. 952 (1968). Nonetheless, even in the area of attempt, this Court has "expressed reservations about the continuing validity of the doctrine of 'impossibility,' with all its subtleties." *United States* v. *Aguilar*, 515 U.S. 593, 605 (1995) (brackets and internal quotation marks omitted). As a leading treatise puts it, "[t]he modern and better view is that impossibility is not a defense [to attempt charges] when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law." LaFave & Scott § 6.3, at 39. It follows *a fortiori* that impossibility of that sort is not a defense to conspiracy charges. Cf. *Williamson* v. *United States*, 207 U.S. 425, 446-447 (1908) (defendant could be convicted of conspiring unsuccessfully to suborn perjury, although attempted subornation of perjury was not a crime).

Abuse of Legal Procedure 22-28 (Harold Dexter Hazeltine, ed., 1982) (1921). In 1611, in the *Poulterers' Case*, 77 Eng. Rep. 813, 813-814 (Star Chamber), the court held that a conspiracy was punishable even if its object crime remained unexecuted. In this country, the crime had achieved its modern definition by 1842. See, *e.g.*, *Commonwealth* v. *Hunt*, 45 Mass. (4 Met.) 111, 123 (1842) (Shaw, C.J.) ("[A] conspiracy [involves] a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."). See generally Francis B. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 395-401 (1922).

By the late nineteenth century, American courts began to address the question whether a conspiracy can be charged if its object has been frustrated. One of the earliest cases is *Thompson* v. *State*, 17 So. 512 (Ala. 1895), in which the convictions of participants in a conspiracy to commit robbery were affirmed, notwithstanding that the intended victim of the conspiracy had learned of the plan, thus making it impossible to achieve. The court explained that "[t]he agreement is the gist of the offense," and that the offense is not "purged because subsequent events may render the consummation of the agreement impossible." *Id.* at 515.

Courts adopted the same principle in federal cases. In *Beddow* v. *United States*, 70 F.2d 674 (8th Cir. 1934), the defendants were convicted of conspiracy to forge endorsements on government bonds. They objected that the forged endorsements would not have been accepted because they were witnessed only by a notary public, not by one of the officials designated by law to witness such endorsements. As the court summarized, the defendants contended "that the conspiracy as

alleged in the indictment and shown by the evidence could never have been successful, and, since it could not have been successful, it was not criminal." *Id.* at 676. The court rejected that argument as "without merit," because "[n]either the success nor the failure of criminal conspiracies is determinative of the guilt or innocence of the conspirators." *Ibid.*

In *Beddow*, the circumstance that was bound to frustrate the conspirators' objective apparently was an integral part of the means that the conspirators chose to carry out the conspiracy from the beginning. But the much more common situation arises where, as in *Thompson* and in this case, the circumstance that frustrates the conspiracy arose, unbeknownst to the conspirators, after the conspiracy was formed. For example, in *Craven* v. *United States*, 22 F.2d 605, 609 (1st Cir. 1927), the court affirmed that defendants could be convicted for conspiracy to import liquor, "even if * * * in effecting the conspiracy the conspirators had been imposed upon by the substitution of liquor of domestic origin."

Later federal cases have consistently applied the same principle, until the decision in this case. See, *e.g.*, *Belardo-Quinones*, 71 F.3d at 944 ("[A] culpable conspiracy may exist even though, because of the misapprehension of the conspirators as to certain facts, the substantive crime which is the object of the conspiracy may be impossible to commit."); *United States* v. *Wallace*, 85 F.3d 1063, 1068 (2d Cir. 1996) ("That the conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant."); *United States* v. *Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("[W]e are persuaded by the views of our sister circuits, that the impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself."); *United States* v. *Seelig*,

498 F.2d 109, 113 (5th Cir. 1974) ("The fact that a government informant was to effect the actual distribution of the drug does not extirpate [defendants'] liability for conspiring [under 21 U.S.C. 846]."); *United States* v. *LaBudda*, 882 F.2d 244, 248 (7th Cir. 1989) ("[D]efendants can be found guilty of criminal conspiracy even though the object of their conspiracy is unattainable from the very beginning."); *United States* v. *Shively*, 715 F.2d 260, 266-267 (7th Cir. 1983) (reasoning that it is "enough if the defendants intend to defraud a federally insured bank, even though, unbeknownst to them, the bank has lost its insurance"), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Jones*, 765 F.2d 996, 1002 (11th Cir. 1985) (stating that "sheer impossibility is no defense" to charge under 21 U.S.C. 846); *United States* v. *Sarro*, 742 F.2d 1286, 1297 (11th Cir. 1984) ("[T]he government did not have to prove that the [goods] were *actually* stolen; it was enough for the government to show that the conspirators conspired [to receive goods] which they *believed* were stolen.").[5]

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[5] This Court has considered—and rejected—"impossibility" defenses to conspiracy charges in related contexts, in which a defendant who could not have been convicted of committing the substantive offense that was the conspiracy's object asserted that he also could not have been held liable for conspiring with others who could have committed that substantive offense. See *Rabinowich*, 238 U.S. at 86 (defendant who had not declared bankruptcy may be convicted for conspiring to conceal property from bankruptcy trustee, even though substantive offense may be committed only by one who has declared bankruptcy); *Drew* v. *Thaw*, 235 U.S. 432 (1914) (defendant could be convicted of conspiring to escape from insane asylum under New York law, although escaping from insane asylum is not a crime). As the Court explained in *Rabinowich*, "[a] person may be guilty of conspiring, although incapable of committing the objective offense." *Rabinowich*, 238 U.S. at 86.

C. A Conspiracy Does Not Terminate Merely Because Achieving Its Goals Has Become Impossible

1. Under the long-settled principles recited above, the likelihood that a conspiracy will be able to achieve its goals has nothing to do with the existence or continuation of criminal liability for participating in the conspiracy. Because the essence of a conspiracy is the agreement, "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects," *Braverman*, 317 U.S. at 53, not by reference to the factual circumstances that render the conspiracy's success more or less likely—or even render its success impossible. It is the conspiratorial agreement that "determines * * * the duration of the conspiracy." *Grunewald*, 353 U.S. at 397. The conspiracy endures while the agreement endures—regardless of whether the conspirators' beliefs about the possibility of success are mistaken.

In this case, for example, there was no doubt that the agreement was ongoing when respondents joined it. Respondents' fulfillment of their assignment to pick up the drugs demonstrated that the conspiracy was still actively seeking to achieve its objectives at least until respondents were arrested. And that remains true even though the truckload of drugs, unbeknownst to many of the conspirators, had been seized and co-conspirator Arce had agreed to cooperate in capturing the remaining conspirators. Those remaining conspirators, unaware of the government's discovery of their plot, continued to pursue their agreement to possess and distribute the drugs. Accordingly, in light of the conspirators' continuing efforts to realize the conspiracy's purposes, the conspiracy clearly did not terminate with the seizure of the drugs.

That does not mean that a conspiracy continues indefinitely. This Court has held that, so long as the conspirators "continue * * * efforts in pursuance of the plan[,] the conspiracy continues up to the time of abandonment or success." *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); see Model Penal Code § 5.03(7), at 384 (1985). Either abandonment or success will terminate the conspiracy, since in either event the conspirators will cease their endeavors collectively to violate the law in the particular way contemplated by the agreement. But the occurrence of events that, unbeknownst to the conspirators, render the conspiracy's success unlikely or impossible does not terminate a conspiracy, because such events do not terminate the conspirators' "continue[d] * * * efforts in pursu[it] of the plan."[6] *Kissel*, 218 U.S. at 608.

2. The Ninth Circuit's holding in this case was based on the novel proposition, articulated in *Cruz*, that a conspiracy terminates not only when it succeeds or is abandoned, but that a conspiracy also terminates with the "defeat of the object of the conspiracy." *Cruz*, 127

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[6] With respect to a particular defendant, liability for participation in a conspiracy may terminate before the conspiracy itself has terminated. A conspirator retains the ability "to withdraw from the execution of the offense or to avert a continuing criminality." *Hyde*, 225 U.S. at 369. To do so requires the conspirator to take "affirmative action * * * to disavow or defeat the purpose" of the conspiracy. *Ibid.* As this Court has explained, "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978). The occurrence of events that, unbeknownst to the conspirators, make it factually impossible for the conspiracy to achieve its goals has never been recognized as sufficient to constitute withdrawal or abandonment.

F.3d at 795 (quoting *United States* v. *Castro*, 972 F.2d 1107, 1112 (9th Cir. 1992), cert. denied, 507 U.S. 944 (1993)). See *id.* at 795 & n.4 ("[T]he conspiracy * * * had been terminated by the government's seizure of the methamphetamine before Cruz became involved. * * * [I]t was factually impossible for Cruz to have been a member of [the] conspiracy because [other members] had been arrested and the drugs seized before he was even invited to join."). In the court's view, the objects of the conspiracies in this case and in *Cruz* were defeated when the drugs in each case were seized. Because in the court's view the conspiracies terminated at that time, individuals, such as respondents, who were not shown to have joined the conspiracies before the seizures could not be held criminally liable for their participation.

Neither in this case nor in *Cruz* did the court of appeals make any effort to reconcile its holding that a conspiracy terminates when its object is defeated with the long-settled rejection of impossibility as a defense to conspiracy. Instead, the court in *Cruz* simply quoted its own prior decision in *Castro* for the proposition that the "defeat of the object of the conspiracy" terminates a conspiracy. That reliance was misplaced. The court in *Castro* did employ the phrase "defeat of the object of the conspiracy." See *id.* at 1112. But it applied that phrase correctly to refer not to the occurrence of events rendering achievement of the conspiracy's goals impossible, but to the occurrence of events that led the conspirators to abandon their efforts to achieve the conspiracy's end. See 972 F.2d at 1112 ("the object of the conspiracy was not defeated until *the final seizure of cocaine and the arrest of the coconspirators*") (emphasis added). The seizure of the cocaine, together with the arrest of all of the conspirators, was likely to terminate

the conspirators' agreement to distribute cocaine, at least absent evidence that the agreement continued. Cf., *e.g.*, *United States* v. *Davis*, 226 F.3d 346, 353 (5th Cir. 2000) ("Where there is evidence that conspirators managed to continue conducting the business of the conspiracy after arrest, the mere fact of arrest does not prevent the government from relying on that evidence" to show that conspiracy continued.), cert. denied, 531 U.S. 1181 (2001); *United States* v. *Zarnes*, 33 F.3d 1454, 1468 (7th Cir. 1994) ("The arrest or incarceration of a conspirator may constitute a withdrawal for a conspirator, but it does not as a matter of law."), cert. denied, 515 U.S. 1126 (1995) (citation omitted).

Castro itself cited *United States* v. *Bloch*, 696 F.2d 1213, 1215 (9th Cir. 1982), for the proposition that defeat of the object of the conspiracy terminates a conspiracy, and *Bloch*, in turn, cited *United States* v. *Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980). *Krasn*, however, stated a quite different, and correct, principle: that a jury was correctly instructed on withdrawal from a conspiracy when it was instructed that liability for membership in a conspiracy "is presumed to continue unless there is affirmative evidence that the defendant abandoned, withdrew from, or disavowed the conspiracy or defeated its purpose." 614 F.2d at 1229. *Krasn* was generally correct that a defendant's liability for a conspiracy terminates when a "defendant * * * defeat[s] its purpose." See note 6, *supra*. The court in *Cruz* and in this case erred in adopting the quite different principle that a conspiracy terminates when its goal becomes impossible to achieve, even if the defendant, far from defeating the conspiracy's purpose, is actively attempting to achieve it.

D. The Ninth Circuit's Holding That A Conspiracy Terminates If Its Goal Is Factually Impossible To Achieve Creates Obstacles To Successful Law Enforcement And Bestows An Unwarranted And Arbitrary Windfall On Conspiracy Defendants

The Ninth Circuit's rule that a conspiracy terminates when, unknown to the conspirators, their objective has become impossible to achieve would undermine the effective administration of justice and create arbitrary obstacles to the use of perfectly legitimate law enforcement methods. As Judge O'Scannlain demonstrated in his dissent from the denial of rehearing en banc (Pet. App. 49a-50a), the *Cruz/Recio* rule requires courts and juries to conduct an exacting review of the evidence to determine whether the defendant's participation in an agreement to distribute drugs predated or postdated the government's seizure of the drugs. Not only does that determination needlessly complicate the litigation of conspiracy cases, it has nothing to do with the defendant's culpability. It thus creates an arbitrary windfall for defendants lucky enough to have the conspiracy's objectives foiled before they can be shown to have joined in the venture.

1. This case presents an example of the arbitrariness injected into the law of conspiracy by the court of appeals' ruling. Respondents undoubtedly agreed to participate in the distribution of drugs. The court of appeals not only accepted that premise, but found that the evidence was sufficient to support it. For example, the court accepted that respondents' false statements at the time of arrest "point[] * * * to knowledge that they were involved in illicit activity at that time." Pet. App. 4a. The court also accepted that respondents' possession of pagers was incriminating when it noted that

"one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade" and that "the main conspirators would want to stay in especially close communication with their drivers." *Id.* at 5a. See *id.* at 5a-6a (accepting that the evidence suggest[ed] "that [respondents] were simply drivers hired at the last minute"). Despite the presence of overwhelming evidence of respondents' guilt—including their arrest with the truck containing more than $10 million of drugs—the court of appeals nonetheless held that respondents could not be convicted of conspiracy to distribute drugs. Traditional principles of conspiracy law would have assessed respondents' guilt by asking whether they entered into a criminal agreement. The court of appeals' rule, by contrast, precludes respondents' guilt based on a fact—*i.e.*, the time of seizure of the truck—of which they were unaware, over which they had no control, and that had nothing to do with their agreement. Under the court of appeals' rule, if respondents had agreed to join the conspiracy before 1:18 a.m. on November 18, they could be found guilty; if they had agreed to do so after that time, they could not.

2. The *Cruz* court justified its application of factual impossibility not by reference to the defendant's culpability under traditional conspiracy law, but by expressing concern that "liability for the original conspiracy on the basis posited by the government could be endless." 127 F.3d at 795. The court speculated that "[i]t is not difficult to picture [the conspirator who had been arrested with drugs] sitting in the Honolulu Airport Police Station with a copy of the * * * telephone directory in hand, following the detectives' instructions to call all of his acquaintances * * * to come to Honolulu to help him." *Id.* at 795 n.3.

That concern provides no reason to doubt that a defendant may be guilty of conspiracy even when the crime may in fact, though unbeknownst to him, be impossible to accomplish. Rather, it expresses misgivings about law enforcement techniques involving "sting" operations. While courts may consider law enforcement techniques under the entrapment defense, this Court has squarely rejected expanding the entrapment defense to exonerate defendants in cases where the traditional requirements of that defense—government inducement and lack of predisposition—are missing. As the Court explained in *United States* v. *Russell*, 411 U.S. 423, 435 (1973),

> the defense of entrapment * * * was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.

The court of appeals exercised precisely the kind of "veto" that *Russell* prohibits in this case and in *Cruz*, by exonerating those guilty of the crime of conspiracy in order to place limits on certain law enforcement techniques. To make matters worse, the court of appeals altered the law of conspiracy not to protect against the actual law enforcement techniques used in *Cruz* and in this case, but in order to protect against the possible, and entirely hypothetical, wholesale use of those techniques in other circumstances in which, in the court's view, they would not have been justified.

3. Although the court of appeals in this case did not address the possibility that respondents may be liable for a post-seizure conspiracy, the Ninth Circuit in *Cruz* suggested that the defendant there, though innocent of the charged conspiracy, "at most, * * * may have been a member of a *new* conspiracy" formed after the seizure. 127 F.3d at 795 n.4. In his dissent from the denial of rehearing en banc in this case, Judge O'Scannlain doubted that any liability for a post-seizure conspiracy would be possible under the logic of *Cruz*; if the government's seizure of the drugs terminated the original conspiracy, the government's seizure would also appear to have precluded the formation of a new conspiracy to distribute the same drugs. Pet. App. 53a-56a (opinion of O'Scannlain, J.).

If, as Judge O'Scannlain feared, the *Cruz/Recio* rule precludes all conspiracy liability for defendants in respondents' position, the rule would have most serious consequences. It would discourage investigators from engaging in operations that ferret out criminal operations and that prevent conspiracies from achieving their objectives for fear that such action will compromise the government's ability to prosecute all of the guilty participants. In the analogous context of rejecting a claim that impossibility is a defense to an attempt charge under Section 846, the Third Circuit has explained:

> Allowing the [impossibility] defense [under Section 846] would also gut law enforcement efforts to infiltrate drug supply chains. The government goes undercover not only as purchaser, as in the instant case, but as seller, or as middleman. * * * Given the horrendous difficulties confronted by law enforcement authorities in dealing effectively with the

> burdgeoning drug traffic, it is difficult to assume that Congress intended to deprive them of flexibility adequate to counter effectively such criminal activity.

United States v. *Everett*, 700 F.2d 900, 907-908 n.16 (1983) (internal quotation marks and citations omitted). The vital need for undercover government efforts both to apprehend conspirators and to prevent their planned offenses from actually occurring extends far beyond drug cases; similar legitimate law enforcement tactics may be crucial in violent crime, terrorism, and other contexts.

Even if the *Cruz/Recio* rule would permit those in respondents' position to be held liable for a post-seizure conspiracy, it would nonetheless cause unnecessary complications in the framing of indictments. A prosecutor in a case like this would have to decide whether the evidence supported charging a single conspiracy spanning the pre- and post-seizure periods. Charging a single conspiracy would be in the interest of logic and judicial economy, but it would require the prosecutor to determine whether, for each defendant, the evidence would ultimately be held sufficient to support a conclusion of pre-seizure participation in the conspiracy. A mistaken determination by the prosecutor on that point would risk the result obtained in *Cruz* and this case: acquittal for at least some defendants. If the prosecutor instead chose to charge multiple conspiracies, one ending with the seizure and the second beginning thereafter, other complications would arise. Such charges may elicit double jeopardy and multiplicity challenges by the defendants who participated both before and after the government frustrated the "original" conspiracy's objective. The charges may also

elicit challenges to the joinder in a single indictment of the pre- and post-seizure conspirators, see Fed. R. Crim. P. 8, and to the conduct of a joint trial involving all defendants, see Fed. R. Crim. P. 14.

4. The *Cruz/Recio* regime thus threatens to entangle conspiracy prosecutions in complex challenges to the indictment, to the admissibility and sufficiency of evidence, and to jury instructions. All of those consequences arise from the *Cruz*-imposed centrality of the seizure date to the proof of the relevant conspiracy—a fact that is unrelated to the defendants' culpability under traditional conspiracy law. In cases where those challenges are successful, as they were here and in *Cruz*, guilty defendants may escape conviction and punishment. The court of appeals' innovation in conspiracy law should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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FRANCISCO JIMENEZ RECIO and
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR FRANCISCO JIMINEZ RECIO

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BRIEF FOR FRANCISCO JIMINEZ RECIO

STATEMENT

To the statement set forth in the Brief for the United States (2-10) Respondent would suggest that it is important to note that the majority below found that but for the intervention of law enforcement officials the drug laden truck would have been driven to the final destination by Manuel Soltelo and Romiero Arce, not left at the Karcher Mall by law enforcement officials where it was subsequently driven off by Respondent Recio. Pet. App. 6a, 13a (However, see Pet. App. 19a wherein Judge Gould in dissent suggests the truck was to have been left by Soltelo and Arce at the Karcher Mall). The finding of the majority in this regard is important to its determination that there was insufficient evidence to sustain the conspiracy convictions. Pet. App. 10a.

In addition, the language of the Superseding Indictment in which it is alleged that the conspiracy was effectuated ". . . on or about a date uncertain, but by November 18, 1997. . ." (Pet. App. 69a-70a) deserves emphasis in view of the narrowness of the panel's decision that there was insufficient evidence to sustain the conviction for the charged offense.[1]

SUMMARY OF ARGUMENT

Each of the three judges below set forth their views of the case. The majority opinion was joined by two of the panel; one of whom wrote a concurrence. There was a strong dissent. A reading of the majority opinion and the dissent makes clear that the decision to reverse was based on the majorities determination that there was insufficient evidence to support the conviction for the crime charged in the superseding indictment. The majority opinion and the dissent each made only passing reference to *United States v. Cruz*, 127 F. 3d. 791 (9th Cir. 1997), *cert. denied* 522 U.S. 1097 (1998). It is thus clear that the decision reached here was not predicated on *Cruz* and that *a fortiori* the correctness of *Cruz* and thus the question posited on *certiorari* here need not be reached.

Alternatively, as to the question posed in the petition for a writ of *certiorari*, the Respondent would suggest that in view of the public policies implicated in the law of conspiracy; e.g., combination of persons, dangerousness of joint enterprise, increased chance of success by combinations, etc., that these policy considerations are not advanced by a rule of law that a conspiracy does not end as a matter of law when the government frustrates it's objective. The purposes of the law of conspiracy are not enhanced by a rule that allows a "conspiracy" to proceed under the careful and watchful eye of government law enforcement agents. A "conspiracy" that has no likelihood of fruition because of governmental intervention poses no greater danger to society than that of an individual acting alone and suggests no purpose in applying the strictures of conspiracy law to its prosecution.

[1] The failure of Respondent to respond at greater length to the statement in the Brief for the United States, (2-9) is not to indicate agreement with what may be characterized as editorial comment or argument, but rather a view as to this Court's Rule 24 (1)(g) and the expectation that readers can and will separate the statement from the argument and that in so doing will perform the act of redaction that would otherwise be done by Respondent to ". . . leave the Court with what opposing counsel regards as an adequate picture of the case. . ." *Supreme Court Practice*, Seventh Edition, p. 546 (1993).

ARGUMENT

I. THE DECISION IN THIS CASE WAS BASED ON A VIEW OF THE SUFFICIENCY OF THE EVIDENCE, NOT STRICT ADHERENCE TO THE RULE OF *UNITED STATES V. CRUZ*, 127 F. 3D. 791 (9TH CIR. 1997), CERT. DENIED 522 U.S. 1097 (1988).

The Petitioner seeks to have this case decided on the basis of the correctness or incorrectness of *Cruz*. With due respect to the argument of the United States, Respondent would suggest that a reading of the decision below (Pet. App. 1a-44a) would indicate that the result was not reached because of adherence to *Cruz*, but rather because the evidence presented was simply not legally sufficient to prove the conspiracy charged in the Superseding Indictment (Pet. App. 10a). It was the Grand Jury's indictment that set forth the apposite time period for alleged involvement by the Respondent in the alleged conspiracy (". . . but by November 18, 1997." Pet. App. 69a). Apart from a rather passing reference to *Cruz* the majority below did not reach its decision because of *Cruz*. Pet. App. 3a. The majority looked at the evidence produced at trial and found it wanting. Pet.

App. 4a-8a, 10a[2] or as said by the United States "The majority held that the evidence presented at the second trial was insufficient." Brief for the United States, p. 5.

Indeed, in a strong dissent below, the quality and quantity of the evidence was examined carefully and at length. Apart from a footnote reference indicating that the panel was bound by *Cruz* the dissent below examined the evidence and found in its view that it was sufficient to sustain the conviction. Pet. App. 21a. However, that view did not command the majority.

Clearly, had the dissent read the majority opinion as being decided and mandated solely by application of the *Cruz* rule, there would have been little need for the dissent to express at length a differing view as to sufficiency of the evidence from the trial. Pet. App. 21a-34a. The dissent disagrees with the majority that the evidence was insufficient. Pet. App. 42. The dissent does not disagree that the panel was bound by *Cruz*; Pet App. 21. However, *Cruz* did not dictate the result in this case; differing views as to the sufficiency of the evidence did.

This Court does not normally resolve questions as to the sufficiency of evidence determined by Courts of Appeal[3]. "As such, we are presented primarily with a question of fact,

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[2] To be sure, the concurrence suggested that *Cruz* dictated the result. Pet. App. 14a; however, that view did not form the predicate for the resulting reversal of the conviction below. "Having said this [. . . we are bound by *Cruz*] however, I also concur in the majority holding that the evidence presented at this second trial was again insufficient. . .". Pet. App. 15a.

[3] *Cruz* may or may not be "good law". Brief for the United States and infra. On the other hand, the reversal of the decision in this case to reach what may be a wrong decision in *Cruz* seems draconian. It may be that a way around that connundrum would be to remand to the Court below for a determination whether it's decision would be the same without reference to *Cruz*. If so, this case would not be the vehicle to examine *Cruz*; if not, it may be. However, on remand that question would be more clearly set forth.

which does not merit Court review." *Hendricks v. Cty. Rural Electric Corp*, 454 U.S. 170, 176 n. 8 (1981). Also see Justice Holmes' unadorned "We do not grant *certiorari*, to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925).

II. A CONSPIRACY SHOULD TERMINATE WHEN ITS OBJECTIVE HAS BEEN FRUSTRATED OR BECOME IMPOSSIBLE TO ATTAIN AS A CONSEQUENCE OF GOVERNMENTAL INTERVENTION.

The United States well canvasses the history and the law of conspiracy in its Brief. It would be idle to suggest that the history and law generally of conspiracy are otherwise than set forth by the United States.

However, it may not be idle to reflect on whether that history and that law ought not be carefully examined in the context of the question presented here and in the context of further development of the law and the application of the law of conspiracy.

If, as Professors Perkins and Boyce note "Conspiracies are made punishable because of the increased dangers in group offenses." *Criminal Law*, Perkins and Boyce, 3rd Edition, 1982, p. 689, and if traditionally it has been seen that conspiracies are terminated by abandonment or accomplishment, *United States v. Kissel*, 218 U.S. 601 (1910), it may be time to inquire as to what policy considerations are advanced by a rule of law that a conspiracy does not end by government frustration of its purposes.

As is well noted in the cases cited by the United States in its Brief, the wellspring of conspiracy is in the dangerousness of the combination of action and the combination of players.[4]

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[4] See generally Francis B. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922) ". . . it is high time to abandon the prevalent and often

Thus, it is suggested that concerted action is more probable of success, and thus more dangerous and offensive to the safety and security of society than are individual actions. That being said and likely true, then what is there in an actor joining a conspiracy under the watchful eye of government law enforcement officials that connotes either a greater likelihood of success or more dangerousness or offensiveness to society in general than would be posed if that same actor were acting alone? Nothing. The conspiracies here and in *Cruz* were not going to succeed. They had been effectively, if not legally, terminated by governmental intervention. The drugs in neither case were going to be sold to ultimate consumers. Both here and in *Cruz* there was no chance of successful completion of the goals of the alleged conspiracies. Indeed, in both instances the conspiracies were formed in part by government agents. Superseding Indictment, Pet. App. 69a-70a.

Thus, if the rationale for penalizing the conspiratorial agreement is that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts," Brief for the United States 12-13, citing *Callanan v. United States*, 364 U.S. 587, 593 (1961), then the rationale is surely to be found wanting when the conspiracy is formed in part, joined in part, and wholly observed by government law enforcement agents. This is not to suggest that the behavior of one who seeks to join the conspiracy being directed in part and watched in whole by law enforcement agents ought be ignored. Here, Respondent Recio was convicted of another substantive crime. Pet. App. 2a. That would most often be the case and thus there would be no such *panacea* for miscreants as the government suggests if the question posited here is answered affirmatively. Brief for the United States 24-26. "But

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repeated idea that mere combiniation in itself can add criminality or illegality to acts otherwise free from them." at 437.

statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges". *Krulewitch v. United States*, 336 U.S. 440 (1949), J. Jackson concurrence at 457.

To be sure, it might be well and it might be time to reflect on the whole of Justice Jackson's concurrence in *Krulewitch* on the nature of conspiracy and conspiracy prosecutions. Conspiracy is "an elastic, sprawling and pervasive offense" Justice Jackson indicated in *Krulewitch* at 445. That the law of conspiracy is confusing and complicated cannot be gainsaid. For if the Ninth Circuit misapplies the rule of when a conspiracy terminates in *Cruz*, as is argued by the United States, what can be made of the subsequent determination of the Court of Appeals for the District of Columbia Circuit that "Contrary to the government's assertion that impossibility as a matter of law is not a defense to conspiracy, it clearly is in this context", *In Re Sealed Case*, 223 F. 3d. 775 (D.C. Cir. 2000). That the Court there probably came to that conclusion by a misreading of *United States v. Hsu*, 155 F. 3d. 189 (3d. Cir. 1998) adds to, not detracts from, Justice Jackson's suggestion that "the modern crime of conspiracy is so vague that it almost defies definition" *Krulewitch*, concurrence at 446.

The United States argues that the *Cruz* rule ". . . would discourage investigators from engaging in operations that ferret out criminal operations and that prevent conspiracies from achieving their objective for fear that such action will compromise the government's ability to prosecute all of the guilty participants." Brief for the United States p. 27. To the same end is the argument that *Cruz* would require, *inter alia*, ". . . the prosecutor to determine whether for each defendant, the evidence would ultimately be held sufficient to support a conclusion of pre-seizure participation in the conspiracy." Brief for the United States, p. 28. To be sure, the arguments

assume one can be guilty without participation, and they assume further that neither law enforcement nor prosecutors are capable of making these fine distinctions that set our system of justice apart from those where burdens of proof, persuasion and going forward are shifted. Respondent Recio does not share that negative view of law and prosecutorial enforcement abilities and the willingness to perform the tasks assigned to them.

It may be that *Cruz* would require more precision in drafting indictments than was shown here. Superseding Indictment, Pet. App. 69a-70a. On the other hand, notwithstanding the continued viability of Judge Learned Hand's observation those many years ago that a count of conspiracy may be ". . . that darling of the modern prosecutor's nursery. . ." *Paine v. United States*, 7 F. 2d. 259, 263 (2d Cir. 1925), neither the passage of time nor the evolution of the law eliminates the requirement that the modern prosecutor perform those functions peculiarly assigned, under our system of justice, to them. Those functions include the responsibility to make the fine distinctions that inhibit criminal activity from going forward and to determine for each defendant his/her requisite responsibility and role in the offense to be charged. Our system of justice requires no less and *Cruz* requires no more.

If we look at the historical purposes of the law of conspiracy, look too at how those purposes have been applied in the not so long line of conspiracy cases, then it may be well to examine the predicate for why a conspiracy ought not end as a matter of law when the government frustrates its objective.[5] That we may resolve in 2002 that question

[5]*See*, Developments in Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959). "Although it seems clear that the conspiracy ended with the frustration of its purpose, the Court reasoned that "come what may", the determination of the conspiracy not to pay whatever part of such taxes that they could still evade was doubtless present." Citing *United States v. Goldstein*, 135 F. 2d 359, 361 (2d Cir. 1943).

posited in 1959 by the note author of 72 Harv. L. Rev. 920 (1959) at 961 and thought to be "clear", Respondent Recio would suggest lends support for the result reached in *Cruz* by the Ninth Circuit even if not at all readily supported by other Courts. It may be that the note author was prescient in 1959 or it may be, Respondent Recio would urge, that the Ninth Circuit was in *Cruz*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, in the alternative the Court should remand for a determination of whether the decision reached below would be the same without reference to the holding in *Cruz*.

Respectfully submitted,

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STATEMENT

1. On November 18, 1997, at 1:18 a.m. a Nevada state trooper stopped a white Nissan truck that was headed north out of Las Vegas, simply for traffic enforcement purposes. (Tr. p. 69).[1] Manuel Sotello was the driver and Ramiro Arce was the passenger. After becoming suspicious of the two, a search of the bed revealed 369 pounds of marijuana and 14.8 pounds of cocaine. (Tr. pp. 126-127). Sotello and Arce said they knew nothing of the drugs and that they were simply driving the truck to Nampa, Idaho, where they were instructed to leave it parked at Karcher Mall, a shopping center in Nampa, Idaho. (Tr. p. 169, 189).

The truck was flown to Idaho and placed in the Karcher Mall parking lot at about 10:00 a.m. on November 19, 1999, some 33 hours after the seizure of the truck and drugs. (Tr. p. 171). By 6:00 p.m. that evening, the agents concluded that Sotello and Arce had lied about their plan to simply leave the truck at Karcher Mall.[2] (Tr. pp. 191-192). The agents persuaded Arce to cooperate, and they hatched a plan whereby Arce would use a cellular phone to call a pager number that he had obtained in Arizona which he believed was a link to other participants. (Tr. pp. 197-198). Arce called the Arizona pager number, at about 7:29 p.m. on November 19, and minutes later, received a call in response. (Tr. p. 200). Arce explained to the unknown caller that Sotello had been arrested on traffic tickets and

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[1] Throughout this brief, Tr. will be used to refer to the transcript of the second jury trial, January 12, 13, 14, and 15, 1999.

[2] Arce testified that the real plan was for Sotello to drop Arce off at his home in Caldwell, and then drive the white Nissan to its destination and deliver it to Delfino Corrales. (Tr. p. 484, 662, 663).

had instructed Arce to leave the truck at Karcher Mall and then to contact the pager number to pass on that information. (Tr. p. 199). I.N.S. Agent Nygaard listened in on the call, and testified that the caller was confused[3] about the location of the truck, was excited, and told Arce that "he was going to call a muchacho (boy) to come and get the truck." (Tr. p. 219).

Nothing more happened at the Karcher Mall stakeout for several hours. After several more calls by unknown persons back and forth, at about 10:30 p.m., a blue Mazda compact car driven by Appellant Lopez pulled up to the white Nissan and stopped; a man later identified as co-defendant Jiminez got out of the blue Mazda and started the truck. Both vehicles drove towards Marsing, Idaho. The truck went to Homedale, Idaho and was stopped by surveillance units on a back road between Homedale, Idaho, and Adrian, Oregon. The blue Mazda, driven by Appellant Lopez, initially stopped at the Sunnyslope Market near Marsing, Idaho, where a call was made. The Mazda then continued towards Homedale on a similar, but not identical, route to that of the truck, and was stopped by police within eyesight of the truck. (Tr. pp. 289-339).

Two "talk and toss" telephone cards were found in Lopez' wallet. (Tr. p. 363). The cards were the type one buys in a convenience store with a fixed amount of calling time. *Id.* To use the card, one simply dials an account number which is written on the card. *Id.* The card can be passed from one person to another, and one does not even

[3] The caller thought "Nampa" was "Tampa" and wasn't sure exactly who Arce was. Exhibit 54b, E.R. pp. 58, 62.

need to physically possess the card to use it, one simply needs the account number. (Tr. p. 372).

Records of these phone cards reflected that the account number assigned to the Lopez cards was used to call Nu Acres, was used to call other local pay telephones, and was used to call a cellular telephone listed to Roberto Valladares in Chicago. (Exhibit 69, See E.R. p. 57). The government produced no tangible evidence as to who participated in these phone conversations, or what the conversations were about. A number of the calls made on the phone card account, Exhibit 69, (E.R. p. 57) were not connected (the ones designated on that exhibit with an asterisk). Agent Hinton testified that over the four day period leading up to the 19th of November, eleven or twelve calls were actually connected using the Lopez calling card. (Tr. p. 688). Of the 400 phone calls placed or received on the cellular telephone found in Sotello's possession, none were connected to the calling card account numbers used, non-exclusively, by Lopez. (Tr. p. 684-685). None of the Sotello calls were to Nu Acres. *Id.*

The government's expert witness conceded that Appellant Lopez could not possibly have made all the phone calls traced to the card found on Lopez, because the time gap between two separate sets of calls was too short to allow for travel between the points of call origination. (Tr. p. 691).

Ramiro Arce took a plea bargain and testified against the other defendants. He related that he had known Sotello for years, and that immediately prior to the November trip to Arizona, Sotello recruited him to assist in bringing a load of drugs from Phoenix, Arizona, to Idaho in the white Nissan. (Tr. p. 466). Arce testified he did this for

forgiveness of a small debt owed to Sotello, and that this was the only drug smuggling incident he engaged in. *Id.* at 466, 495, 654. Prior to meeting Appellant Lopez in jail after the arrest on November 19, 1999, Arce had never seen Lopez and did not know Lopez. (Tr. p. 495).

Apart from the drugs present in the load truck, there was no evidence of any other drugs or any other load vehicles. There was no tangible evidence of any other past drug shipments.

There was no tangible evidence of planned future shipments. (Tr. p. 656). Agent Hinton indicated his belief that Arce was truthful in his account that he had been recruited at the last minute to participate in just the one trip to get drugs. (Tr. p. 654).

2. An amended superseding indictment was filed on January 16, 1998. Count one charged that "From on or about a date uncertain, but by November 18, 1997, within the District of Idaho, Manuel Sotelo, Ramiro Arce, Francisco Jiminez and Adrian Lopez, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the Grand Jury, to commit an offense against the United States, that is, to possess with intent to distribute and/or distribute cocaine . . . and or marijuana. . . . " The second count charged that the same four defendants possessed with intent to distribute, marijuana and cocaine.

The limiting language of the indictment, charging that Appellant joined "by" November 18, 1997, was born out by Government's opening and closing arguments at the first trial:

> There are two counts in the indictment . . . The first is conspiracy. The evidence will show you that there was indeed a conspiracy, that is, an association and a agreement among these three individuals and Mr. Arce and others to bring narcotics from the southern part of the United States up to Idaho.

(Government's Excerpt of Record (hereinafter G.E.R.), Vol. I, p. 46-47 of first trial, March 17, 1998, opening statements).

The case proceeded to jury trial on March 16, 1998, against Defendants Sotello, Jiminez, and Lopez. The jury returned guilty verdicts on both counts against each defendant. Appellant Lopez moved for Judgment of Acquittal under F.R.Cr.P. 29, (E.R. p. 3) and under the holding in a similarly postured case, *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997).

The Government filed a "Response By United States To Defendants' Motions For Judgment Of Acquittal" on April 8, 1998. The Government argued therein:

> The *Cruz* case is distinguishable from the case at bar. . . . As to Defendants Jiminez and Lopez, the arrest of Sotelo and Arce and the seizure of the narcotics in Nevada did not terminate the conspiracy or defeat the object of that conspiracy as far as they were concerned, by virtue of their prior involvement. Indeed, their activities after the arrest and confiscation were merely a manifestation of that prior involvement. In this regard, the telephone call by Arce was not that of "recruitment," but one of notice of the load arrival in a pre-existing and ongoing conspiracy as far as they knew and were concerned. . . . All of the evidence admitted as to [] Jiminez and Lopez

> . . . manifested prior involvement. . . . When Arce made the delivery notice telephone call, he did so as a co-conspirator to other co-conspirators, with yet other co-conspirators responding to pick up the load.

(See Appendix A to this Brief, p. 4-5).

In a Memorandum Decision And Order filed July 27, 1998, the District Court denied the motion for judgment of acquittal, but found sufficient error in the proceedings to *sua sponte* convert the motion to a motion for new trial, and the District Court set aside the conviction and re-set the case for jury trial. *See* M.D.O (E.R. pp. 5-14).

The government thereafter filed another motion asking the trial court to reconsider that order. Res. App. 17a. Therein the government stated it "agree[d] with the essential formulation of the primary issue" of whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18." Res. App. 18a. Therein the government characterized the *Cruz* case as a conspiracy that was limited by the indictment and the evidence to five individuals and one load of drugs, one in which Cruz was indisputably not involved prior to the seizure. The government stated that in this case, "the charging document refers to a conspiracy that had been ongoing from a date uncertain up to and including November 18, 1997." Res. App. 19a. The government asserted that "the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to the November 18 seizure in Nevada" and thus "there is no need to consider whether or not Jiminez and Lopez were members of a new conspiracy subsequent to the seizure of

the drugs [because] they were clearly members prior to that seizure." Res. App. 21a.

The case proceeded to a second trial on January 12, 1999, but only on the conspiracy charge, Count One of the superseding indictment, and only defendants Jiminez and Lopez were re-tried. The government moved to sever, and eventually to dismiss, Count Two, the substantive charge of possession with intent to distribute as to Lopez.

The District Court gave a jury instruction, no. 24, on the scope and duration of the conspiracy. (E.R. pp. 52-54). The instruction stated, in part:

> Therefore, if you find beyond a reasonable doubt that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or the delivery of the controlled substances seized by authorities in Las Vegas, Nevada on November 18, 1997, a defendant may be found guilty of that conspiracy only if you find beyond a reasonable doubt that the defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.

The trial court also, at the government's request, provided a larger conspiracy theory instruction as an alterative, stating:

> On the other hand, if you find beyond a reasonable doubt that a conspiracy existed, the object of which was the possession with intent to deliver and/or the delivery of controlled substances beyond those seized by authorities in Las Vegas . . . a defendant may be found guilty of that larger conspiracy only if you find beyond a reasonable doubt that the defendant joined the conspiracy, whether before or after November 18,

> 1997, and that he knew or had reason to know of the scope of the larger conspiracy and embraced its objective.

(Tr. p. 758). The government was satisfied with this instruction. Res. App. 29a.

The jury returned guilty verdicts on the sole conspiracy count against Appellant Lopez and against Jiminez. Again, Appellant Lopez filed a motion for judgment of acquittal. (E.R. pp. 64-65). The District Court denied the motion by way of Memorandum Decision And Order of April 19, 1999. (E.R. pp. 72-74). Appellant Lopez was sentenced to 132 months imprisonment.

3. On direct appeal, the Ninth Circuit Court of Appeals held that the evidence presented by the United States was insufficient to convict Lopez of either of the two theories of conspiracy set forth in Instruction No. 24. On appeal, the government argued that a reasonable inference from known facts demonstrated that Lopez was involved "well before the seizure" of the drugs, because his "post-seizure behavior not only corroborated his pre-seizure activity . . . but, in and of itself, suggested prior involvement" and "[m]oreover, those same facts show a pre-existing conspiracy that involved much more than the single load as evidenced by the quantity of narcotics involved, the organization, communication patterns and structured activities." Res. App. F. The Court of Appeals was not convinced with the government's proof:

> The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court stated that "Lopez's and [Recio's] words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jiminez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using pre-paid calling cards.
>
> This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jiminez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the pre-paid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls upon Lopez-Meza's card *were* made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations. . . .
>
> * * *
>
> On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page

stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers hired at the last minute. Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jiminez Recio retrieved the truck – the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendants were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.

The government also relied on an additional broader conspiracy theory to circumvent *Cruz* on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. *Cf. United States v. Umagat*, 998 F.2d 770, 773-774 (9th Cir. 1993)(minor role of defendants in single transaction does not permit imputed liability for the broader conspiracy). Therefore, this theory too hinges on proof of prior involvement. . . .

Ultimately, however, we remain unpersuaded. . . .

> As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a. "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

The government filed a petition for writ of certiorari, which was opposed by respondent. The petition was granted and the matter is before this Court.

SUMMARY OF ARGUMENT

The issue presented in the Petition is "whether a conspiracy ends as a matter of law when the government frustrates its objective." Petitioner argues that the Ninth Circuit Court of Appeals held in *United States v. Cruz*, supra, and again in this case that "a conspiracy automatically ends when law enforcement intervenes and frustrates the conspiracy's objective." (Pet. Brf. p. 11).

Respondent does not agree with the sweeping interpretation of *Cruz* suggested by Petitioner. If *Cruz* stood as precedent for the proposition that the government's arrest of a co-conspirator and seizure of the drugs bars prosecution as a matter of law for any additional conspiratorial acts subsequent to that intervention, then *Cruz* would stand alone without clear support from prior precedent. While no case has gone so far as to hold that a conspiracy

automatically terminates, or ends, as a matter of law upon intervention and frustration by the government, many have held that a conspiracy, once in existence, continues until it comes to an end, whether by success or failure, or when the ends have been so frustrated or its means so impaired that this continuation was no longer plausible.

The scope and duration of a conspiracy are questions of fact and most cases treat the issue as such, refusing to conclude that conspiracy liability terminates **as a matter of law** because of the arrest of co-conspirators or seizure of drugs. In contrast, courts have recognized that within the context of a given set of facts and a given conspiracy charge, intervening occurrences may have the consequential effect of ending, or terminating, the charged conspiracy, not necessarily as a matter of law, but as a matter of practical fact.

This case, and *Cruz*, follow that precedent because nothing in the holdings suggest that the occurrence of a fact, intervention by the police and seizure of the drugs, terminated further conspiracy liability as a matter of law. Both cases simply recognized that, on the facts presented, there was insufficient evidence that Billy Cruz or Adrian Lopez joined the specific conspiracy charged in the indictment before it ended. Both cases rely simply on the fact that the government charged each with joining a conspiracy, to possess with intent to deliver drugs, that led up to the seizure of the drugs, yet the evidence revealed that each defendant was recruited after, and as a result of, the government intervention, which was a separate agreement, a separate conspiracy.

Thus, *Cruz* and this case are also correct applications of the long-settled law concerning multiple conspiracies,

applied in most, if not all, Federal Circuits, and given as a jury instruction, that "if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy." *Cruz* specifically stated that the facts of the case demonstrated that Billy Cruz was not a member of the charged conspiracy; the opinion stated that Cruz may well have been a member of some other conspiracy not charged in the indictment. *Cruz* did not purport to hold that such a charge for post-seizure conspiracy activity could not be made, but only held that it was not in fact charged in the indictment.

This case follows suit. The indictment specifically alleged that Recio, Lopez, Arce, and Sotello joined the conspiracy on a date uncertain but "by November 18, 1997." A charge of conspiracy is limited by the terms of the indictment. In addition to the language of the indictment, the government specifically indicated to the trial court and to the jury that it charged a conspiracy based upon Lopez' involvement in the conspiracy before, and leading up to, the seizure, and refuted the notion that the charge was based upon a simple theory that Lopez was a new recruit after the seizure. The Ninth Circuit Court of Appeals found that the government's alleged proof of its claim was entirely lacking, that Lopez was likely recruited afterwards as a result of the government's intervention, a key factual similarity to *Cruz*. Thus, these facts were not used by the Ninth Circuit to construct a bar to conspiracy prosecution, but they do evidence a separate conspiracy not charged in the indictment which cannot sustain a guilty verdict upon the charged conspiracy.

Finally, contrary to Petitioner's concerns, nothing in *Cruz* or in this case serves to create any new or additional barrier to investigation or prosecution of criminal conspiracies. This Court long ago commented that because of the factual complexity and number of suspects, conspiracy prosecutions are usually difficult. The bottom line is that suspects such as Lopez can of course still be arrested and charged for any substantive crimes committed or attempted, and can be charged with any conspiracy that he/she actually joined. This Court should decline Petitioner's invitation to erode the few basic protections afforded by our laws against what has been described as an elastic, sprawling, and pervasive offense that can be a threat to fairness in our administration of justice, and which should not lightly be extended to meet the exigencies of a particular case.

ARGUMENT

A. The Scope And Duration Of A Conspiracy Is A Question Of Fact.

The law itself does not establish a fixed time at which a conspiracy must have been entered into and the law does not require any particular duration. *United States v. Couch*, 28 F.3d 711 (7th Cir. 1994), cert. denied, 513 U.S. 993, 115 S.Ct. 495, 130 L.Ed.2d 405 (1994). "The duration of a conspiracy will depend on the terms of the conspiracy agreement but, generally, a conspiracy exists from the time of forming the criminal agreement until it terminates by abandonment, frustration, or the achievement of the conspiracy's objective." *See* 16 Am. Jur. 2d 210, *U.S. v. Chalarca*, 95 F.3d 239 (2d Cir. 1996). The duration and termination of a conspiracy is determined by the particular

facts of each case. *United States v. Varella*, 692 F.2d 1352, 1362 (11th Cir. 1982); *United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir. 1978).

Because of this, Petitioner's statement of the issue presented, whether a conspiracy ends as a matter of law when the government frustrates its objectives, is not conducive to a short and certain legal answer. The answer, of course, depends upon the precise nature of the given criminal agreement, the specifications of the indictment, and what frustration subsequently occurs. Petitioner's assertion that *Cruz* held that a conspiracy "automatically" ends when law enforcement intervenes and frustrates the conspiracy's object overstates the precise holding of the case. The indictment in *Cruz* "charged a five-member conspiracy of Balajadia, Taitano, Tenorio, Mesa and Cruz." 127 F.3d 791, 795 n. 4. The conspiracy was limited to an agreement by Balajadia to carry a 210 gram package of drugs from California to Tenoria in Guam, at the behest of Mesa, and with the assistance of Taitano. In transit, Taitano and Balajadia were arrested and the drugs were seized. At that moment in time, by stipulation of the parties, Cruz was undisputedly *not* involved in the conspiracy.

The court determined that on these facts, the conspiracy that was **charged** terminated at this time. The criminal agreement was that Balajadia would smuggle one packet of drugs from Mesa in California to Tenorio in Guam. When that failed (either because of government intervention in fact or because Mesa and Tenoria believed the government's lie that Balajadia had simply failed in his mission for financial reasons) a *new agreement* was reached that Cruz would go to and smuggle a packet from Hawaii to Guam. Those are two agreements, separate in

time, separate in membership, with the distinguishing factor that the second agreement occurred only because of, and as a result of, the original conspirator's belief that the first agreement had failed. The second, new "mule" was recruited because the first "mule" failed. Given that, the gravamen of conspiracy is the agreement itself, a new agreement reached because a prior one failed can be a new conspiracy.

The court held that because the charged conspiracy, the agreement itself, was a five-member one and the government stipulated that Cruz was not involved until Balajadia and Taitano had been arrested and the drugs seized, Cruz could not possibly have joined the charged conspiracy. *Id.* at 795, n. 4. "Cruz may have been a member of a *new* conspiracy between himself, Mesa, and Tenoria [however] that conspiracy was not charged in the indictment." *Id.* No less than three times, on page 795 of the decision, does the *Cruz* court reiterate that the arrest and seizure did not terminate conspiracy liability in general, but rather emphasized the fact that Cruz simply did not, and could not possibly have, joined the charged conspiracy before it ended. *Id.* The court twice pointed out that Cruz was not charged with the conspiracy proven by evidence, the one that began after and as a result of the Balajadia's withdrawal from the conspiracy and his failure to deliver. "We therefore find that the evidence was insufficient for any rational jury to have found beyond a reasonable doubt that the [charged] conspiracy was still in existence at the time Cruz became involved." *Id.* at 796.

Cruz, therefore, was specifically limited to the relatively simple facts involved, and the specific conspiratorial crime, or agreement, charged in the indictment. *Cruz* is by no means alone in its specific review of whether the facts

demonstrates that the conspiracy which was charged has been proven. *See United States v. Martin*, 4 F.3d 757 (9th Cir. 1993) (wherein the court noted that the indictment alleged five people agreed with each other in one conspiracy, and the facts showed that Martin, although involved in drug dealing, was double-crossed by three of the others and the proof failed to establish the overall conspiracy charged), and other cases below.

B. Depending On The Facts And The Indictment's Charge, A Conspiracy May End, Or Terminate, When It Fails Or Is Frustrated

1. This Court recognized long ago that statements made by a co-conspirator not made pursuant to and in furtherance of the object of the conspiracy charged in the indictment, but rather made after the objective had failed or been achieved, were not admissible. *See* Annotation, 1 L.Ed.2d p. 1787. "After the conspiracy has come to an end whether by success or failure" the confessions of one conspirator are not admissible against another. *Brown v. United States*, 150 U.S. 93, 97, 14 S.Ct. 37, 37 L.Ed. 1010, 1013 (1893); see also *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892). There can be no furtherance of a conspiracy that has ended. *Paoli v. United States*, 352 U.S. 232, 237, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957). Statements made after a conspiracy ends in success or failure are not admissible. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

The determination is based primarily on specific facts involved and what the conspiratorial agreement is. *United States v. Armocia*, 515 F.2d 29 (3rd Cir. 1975). For instance,

> It cannot be said that the conspiracy which was amply proved without this evidence was ended merely because this particular [bootleg alcohol] still had been seized and some of the conspirators arrested. The conspiracy was "to defraud the United States by evading and defeating, and attempting to evade and defeat, the payment of Internal Revenue taxes duly imposed by law on distilled spirits." Undoubtedly that part of the conspiracy which involved the manufacture of alcohol with the still that was seized at 102 Murray St. had been frustrated and the arrests may well have checked the activities of the conspirators taken into custody; but to say the unlawful agreement had been terminated when Levigno paid the bill and admonished the merchant to say nothing in court would mean that the conspirators no longer planned to defraud the government by evading the payment of distilled spirits taxes due.

United States v. Goldstein, 135 F.2d 359, 361 (2d Cir. 1943). Commentators have suggested that this case may have been abuse of the concept of a "continuing" conspiracy, noting that it seemed "clear the conspiracy ended with the frustration of its purpose." Developments In The Law Of Criminal Conspiracy, 72 HARV. L. REV. 920, 961 (1959).

Cases have also held that a co-conspirator's arrest does not in itself terminate a conspiracy as a matter of law. *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977). It is a factual inquiry, and many courts have gone either way. In *United States v. Barnes*, 586 F.2d 1052 (5th Cir. 1978), police arrested Barnes' alleged co-conspirators at an airport and seized the cocaine, although Barnes had not been arrested yet. 586 F.2d at 1054. In deciding

whether a post-seizure statement was admissible, the court held that at the time of the statement, the cocaine had been confiscated and two other co-conspirators had been arrested, and the conspiracy was ended. *Id.* at 1059.

Similarly, in *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978), two co-conspirators in a heroin conspiracy were arrested upon their attempt to sell heroin to an undercover agent, and the heroin was seized. 569 F.2d at 415. Caro had not been arrested and one of the co-conspirators made post arrest/seizure statements which were held inadmissible because it occurred after the termination of the conspiracy. *Id.* at 416, n. 9.

In *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), various defendant co-conspirators unwittingly conspired with, and hired, two undercover agents to be pilots to fly-in marijuana from Columbia to the United States. After the airplane crashed on October 8, 1978, the DEA "staged" the return of the undercover pilots to an airstrip in Newborn, Georgia, at which time two defendants were apprehended, and others were arrested in the following weeks. 626 F.2d at 506. The court held that various statements made after October 10 could not be admitted because the events of October 10 "wiped out" and ended the conspiracy. *Id.* at 510-511 n. 8.

2. The Petitioner in this case relies on the case of *United States v. Belardo-Quinones*, 71 F.3d 941 (1st Cir. 1995), for its assertion that *Cruz* is a wrongly-decided aberration which created a conflict among the circuits. A close look at the charges and facts reveals that *Belardo-Quinones* does not conflict with *Cruz*, and it actually supports the decision of the *Cruz* court. The indictment specifically charged "a conspiracy that began on October

26, 1991 with the objective of transporting marijuana from Columbia and ended on November 6, 1991 when the conspirators found out that the boat for which they had been searching had been seized by Venezuelan Authorities." 71 F.3d 941. Belardo-Quinones was specifically described as having joined the conspiracy on November 2, 1991 when he agreed to supply a boat and crew to meet with the Columbian smugglers at sea. *Id.* The indictment ended with an allegation that on November 6, 1991, one of the conspirators made calls announcing that the boat had been seized. *Id.*

Belardo-Quinones appealed the trial court's denial of his bill of particulars which demanded the exact date the boat was seized by Venezuelan authorities, the purpose of which was to "present a defense that, for him, the crime of conspiracy to import marijuana had become impossible to achieve because the boat was seized prior to November 2, 1991." *Id.* The government asserted that the boat was seized "after the rendezvous failed", after Belardo-Quinones joined. The Court of Appeals held the denial of the bill of particulars not error because "[t]his indictment contained more than enough information to allow defendant to prepare his defense." *Id.* "The temporal details in this indictment were sufficient to allow the defendant to present a defense that the conspiracy had ended before he came into the picture." *Id.* at 943-944.

The *Belardo-Quinones* court therefore approved of the very defense which was established and was the basis of the *Cruz* decision: whether the conspiracy ended before the defendant became a member. The two decisions are in harmony and consistent. They both correctly focused on what was charged in the indictment and what the facts

showed, and not on general "conspiracy" principles not at issue.

The *Belardo-Quinones* court also went on to discuss why the defendants' stated theory of defense, that the crime was impossible **to achieve** because the smuggling boat was seized before he met with co-conspirators. Because the court had already ruled on other grounds, this discussion is dictum. Still, the further discussion relates to a defense distinctly different than the one in *Cruz*, which was Belardo-Quinone's suggested defense that because the boat was seized prior to the point in time he met with and conspired with other members, it would be impossible to achieve the importation of marijuana. Respondent does not dispute the court's suggestion that such a defense would not have merit. It is no different than the case of a person, arrested for agreeing and conspiring to drive across town and murder someone, suggesting that despite the clear existence of the conspiratorial agreement, the murder was impossible to commit because his car was in disrepair and inoperable. The proper question is whether the defendant joined the charged conspiracy by agreeing and becoming a party thereto before it ended, not whether his timely joinder was mooted because the goal could no longer be achieved.

Belardo-Quinones involved a clearly charged indictment alleging that the defendant conspired within a certain time frame and his actions in that regard were proven. The case does not directly address the question presented in *Cruz*, which, on the facts of *Belardo-Quinones* would be whether someone who "came into the picture" after November 6, 1991 could be found guilty of the conspiracy charged. However, the case strongly suggests that would be a proper defense. 71 F.3d at 944.

A final feature of importance, when comparing the cases, is how *Belardo-Quinones*' suggestion that it would be "a defense that the conspiracy had ended before he came into the picture" applies even more strongly to the facts of *Cruz*. In contrast to *Cruz*, the government in *Belardo-Quinones* did not encourage that defendant, through the use of an arrested conspirator controlled by the government, to come join a conspiratorial plot that had already been foiled. Without any government encouragement, Belardo-Quinones voluntarily agreed to supply a boat and crew to meet a Columbian boat to smuggle marijuana, and in fact, received an upward adjustment on his sentence for his managerial role in recruiting, supplying, and instructing other co-defendants on how to handle the rendezvous-at-sea marijuana pick up.[4] 71 F.3d at 946.

Of course, *Belardo-Quinones* may be read to simply beg the question, when does the conspiracy end? That case relied on the allegations of the indictment and the facts involved. The question was not whether any particular intervention terminated a conspiracy, in general, as a matter of law, and correctly so. Many other cases, some set forth below, employ the same analysis by examining the facts against the *charged* conspiracy.

Cruz relied on existing law, that a conspiracy is deemed to continue until there is affirmative evidence of

[4] These facts reveal the suggested defense, that "the crime of conspiracy to import marijuana had become impossible to achieve because the boat" was seized, is ludicrous. If the defendant recruited and trained helpers to make an at-sea marijuana smuggling rendezvous, within the parameters of the indictment, whether success is achieved is immaterial to a charge of conspiracy *for him*.

defeat of the object of the conspiracy, citing *United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992). *Castro*, in turn, relied on *United States v. Bloch*, 696 F.2d 1213 (9th Cir. 1982) for that very point of law, and *Bloch* relied on earlier cases. Other circuits are in agreement: a conspiracy has ended when its objectives have been achieved or have been rendered impossible, *United States v. Moss*, 9 F.3d 53 (6th Cir. 1993) (*citing to Wong Sun v. United States*, 371 U.S. 471, 490 (1963); a conspiracy continues to exist until it is abandoned, succeeds, or is otherwise terminated by some affirmative act, *United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995); a conspiracy terminates when the ends of the conspiracy have been so frustrated or its means so impaired that continuation is no longer plausible, *United States v. Gibbs*, 739 F.2d 838, 845, n. 18 (3rd Cir. 1984).

Another factually similar case from the Fifth Circuit reaches the same conclusion as in *Cruz*. In *United States v. Killian*, 524 F.2d 1268 (5th Cir. 1975) three conspirators were arrested in the home of one and the drugs were seized. 524 F.2d at 1270. Shortly thereafter, another alleged co-conspirator (Rowell) telephoned the home and spoke to the agents, leading the investigation forward. *Id.* The court commented that "[b]y the time of [that] call, the only conspiracy alleged in the indictment was totally terminated, having been finally frustrated by the arrest of the three persons present at the Turner residence and the seizure of the remaining PCP on hand." *Id.* at 1272. Similarly, in *United States v. Robertson*, 659 F.2d 652 (5th Cir. 1981), the court suggested that because a truck, with its cargo of drugs, had been seized and conspirators arrested "[i]t might be argued that control of the pickup and, therefore, control of the substantive element of the conspiracy, the marijuana, would have made it impossible

for a party to become a new member of the conspiracy, since the conspiracy had terminated." 659 F.2d at 657, n. 2. The court did not answer the question as it was clear that Robertson had actively participated in a "scout car" on the very same marijuana run, and that she was present throughout the acquisition of the marijuana itself. *Id.* at 656.

4. The case at bar is consistent with both *Cruz* and *Belardo-Quinones*. The indictment in this case limited the duration and scope of the charged conspiracy, in that it alleged Lopez became a member "by November 18." The government's stated position in the trial court certainly clarified that limitation, that it would prove a case within the temporal parameters of the indictment, that it would prove Lopez joined the conspiracy prior to the seizure on November 18. The government refuted the notion that the charge was based on Lopez's recruitment into the conspiracy as a result of Arce's cooperative efforts some 42 hours after the seizure: ("there is no need to consider whether or not Jiminez and Lopez were members of a new conspiracy subsequent to the seizure of the drugs [because] [u]nlike Cruz, they were clearly members prior to that seizure"; Res. App. 21a); ("In this regard, the telephone call by Arce was not that of "recruitment," but one of notice of the load arrival in a pre-existing and ongoing conspiracy as far as [Lopez and Recio] knew and were concerned." App. p. 4); (The indictment "refers to a criminal conspiracy that had been ongoing from a date uncertain up to and including November 18, 1997"; Res. App. 19a).

In light of the way the government framed, and viewed, the indictment and the issue at trial, the Court of Appeals determined simply that there was insufficient

evidence to support their chosen conspiracy charge. The decision was correct and should be affirmed.

C. *Cruz* Is Also A Proper Application Of The Law Of Multiple Conspiracies

The federal circuits have all adopted a version of an oft-given jury instruction in conspiracy cases which states "if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy." O'Malley, Grenig, Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Ch. 38; *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973); *United States v. Dennis*, 917 F.2d 1031, 1033 (7th Cir. 1990) (reversing a conviction where indictment alleged a single conspiracy connecting three members and the evidence showed two, two-member conspiracies of the same nature; failure to give a multiple conspiracy instruction was reversible error). That instruction was given in this case. (Tr. p. 1009). Other cases have held, consistent with the outcome in *Cruz*, that the existence of multiple conspiracies requires reversal only where the defendant's involvement in a particular conspiracy is not the conspiracy charged in the indictment. *See, e.g., United States v. Dekle*, 768 F.2d 1257, 1261 (11th Cir. 1985) and cases cited therein.

There are far too many reported decisions which address the complicated issue, of whether a single versus a multiple conspiracy has been shown, to cover in this brief writing. Generally, they fall within two categories which will be briefly discussed. The first are cases where a defendant argues that an indictment alleged one overall

conspiracy and the proof as to him showed only his involvement in a conspiracy more limited in scope and membership than that alleged in the indictment. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The second category are the cases which analyze whether a given conspiracy conviction can survive a double jeopardy challenge. *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Both of these arenas provide ample support for the Court of Appeals' decisions in *Cruz* and this case.

1. This Court in *Kotteakos* reversed a conspiracy conviction wherein thirty-two defendants were joined in a one-count conspiracy indictment. On appeal from the conviction, the government conceded that the proof did not show one overall conspiracy as alleged, but rather it showed several. 328 U.S. at 755. However, it was also clear that the proof was more than sufficient to uphold each defendants' conviction for his involvement in a limited conspiracy even though there was not one overall conspiracy as alleged. Based on that, the government urged that the error was harmless. This Court disagreed, and on the facts, rejected blind adherence to prior holdings suggesting that "the fact that the proof disclosed two conspiracies instead of one, each within the terms of the indictment, cannot prejudice [the] defense." 328 U.S. at 758, *quoting Berger v. United States*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). This Court concluded that the prejudice arising from the mass trial was too great to ignore, and in doing so, called "for use of every safeguard to individualize each defendant in his relation to the mass" despite the fact that it is inconvenient for the prosecution because our government has a stake in citizens "being afforded our

historical individual protections, including those surrounding criminal trials." 328 U.S. at 773.

What is most notable about *Kotteakos* in relation to this case is that here, the government, in seeking to overturn this case and *Cruz*, is asking the Court to favor a conviction which is not only of a conspiracy different from the single one charged in the indictments, but is a separate conspiracy that is *not* "within the words of the indictment." This effort by the government is more dangerous to the safeguards and protections which were upheld in *Kotteakos* than was the government's position in *Kotteakos* itself. About those protections, "we dare not become careless or complacent when that fashion has become rampant over the earth." *Kotteakos v. United States*, 328 U.S. at 773.

From that landmark decision, has sprung the protections of the multiple conspiracy instruction referred to above. And from that instruction, has sprung many appellate cases which consider whether the government proved the single conspiracy charged, or a separate conspiracy. The appellate review focuses on the precise conspiracy charged and the facts involved, and therefore has always been handled on a case-by-case basis. *See Dennis*, *Bostic*, and *Dekle*, supra. *See also United States v. Barnes*, 681 F.2d 717, 726-727 (11th Cir. 1982) (stating that the multiple conspiracy question is a factual one and was appropriately included as a jury instruction); *United States v. Aracri*, 968 F.2d 1512, 1521 (2d Cir. 1992) (the court conducted a review of the evidence to determine if the jury could have properly concluded the evidence showed one, and not multiple, conspiracies).

Much earlier, in *Terry v. United States*, 7 F.2d 28 (9th Cir. 1925) defendants were indicted for conspiracy to illegally transport liquors in violation of the National Prohibition Act. 7 F.2d at 29. The indictment specifically charged that Terry participated in a conspiracy in November, 1921 at or near Allen's Wharf to do so. *Id.* The evidence against *Terry* primarily related to his activities to transport liquor six weeks earlier at Bodega Bay. *Id.* His conviction was reversed upon a sound holding that still rings true:

> The plaintiff in error contends that the charge in the indictment is limited to a conspiracy entered into at or near Allen's Wharf, in the county of Monterey, and does not extend to or include the prior incident at Bodega Bay. . . . The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however diverse its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or party to that conspiracy. Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it.
>
> Here we find no testimony tending to show any general conspiracy covering and including both the incident at Allen's Wharf and the incident at Bodega Bay. . . .
>
> * * *
>
> In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict for the sins of a lifetime.

7 F.2d at 29-30.

The decisions in this case and in *United States v. Cruz* are therefore entirely consistent with the above authorities in that the review of the evidence showed at most multiple conspiracies in that Cr[illegible]d Lopez were at most involved in a separate, new consp[illegible]y, and not the one charged in the indictment. The government's key informant here, Arce, indicated that it was a one-time agreement on his part to smuggle the one load of drugs which was seized in Nevada. Lopez only became involved after, and as a result of, that failure, about 45 hours later.

2. The second category of "multiple conspiracy" cases are the ones brought in a double jeopardy context. *United States v. Broce*, supra, was such a case. Broce plead guilty to two separate conspiracy indictments charging a bid-rigging scheme. 488 U.S. 566. Meanwhile, another similarly situated defendant took a similar charge to trial and was acquitted. *Id.* The government re-indicted that defendant, Beachner, on three other bid rigging conspiracy charges. *Id.* Beachner successfully moved to have the second case dismissed on double jeopardy grounds by showing that all the bid-rigging was part of one, overarching conspiracy *Id.* at 567. Upon learning this, Broce attempted a collateral attack on his second conviction, asserting the same double jeopardy claim. This Court concluded, that notwithstanding the correctness of the Beachner case, that the Broce indictments themselves alleged two distinct conspiracies, specifically noting "that is how all the participants viewed the indictments at the

time." 488 U.S. at 571, n. 5b. The Court noted that generally, a single agreement to commit several crimes constitutes one conspiracy, while multiple agreements to commit separate crimes constitute multiple conspiracies. *Id.* at 570-571. The Court concluded that by pleading guilty to two indictments, Broce forfeited his opportunity to challenge "the theory of the indictments" which on their face charged two separate conspiracies, noting "our reading of the indictments is the necessary one, and was shared by all participants to the plea proceedings." *Id.* *Broce* reveals that even though the ultimate facts may show one conspiracy, the government may charge separate ones and distinct ones. In this case and in *Cruz*, the government charged a distinct conspiracy that led up to the seizure of the drugs. The government felt confident the proof would bear this out. Perhaps the government felt a jury would not be receptive to a conspiracy prosecution against someone who was, or may have been, recruited into the case by a cooperating suspect at the government's behest, and therefore, sought to avoid this issue by alleging he was a member all along.

In this case, Respondent challenged the "theory of the indictment", which was that Lopez joined a conspiracy that led up to the seizure of the drugs, in the manner suggested by *Broce*. 488 U.S. at 571. Just like the fact that Broce was held to have forfeited his right to challenge the theory that there were two distinct conspiracies because in pleading guilty he "shared" that view of the indictment, so too should the government here be held to its view and theory of the indictment in trial court. The government's view and theory of the indictment quite clearly was that it charged Lopez as a member of a conspiracy that led up to

the seizure of the drugs, and not as someone recruited into a conspiracy because of the seizure.

Respondent suggests that *United States v. Broce*, supra, demonstrates that the Ninth Circuit's determination that the facts shown were insufficient to establish the single conspiracy charged is one deserving of the same deference this Court would give any other criminal appellate decision regarding sufficiency of the evidence.

Other double jeopardy decisions support the decision in this case. In *United States v. Mallah*, 503 F.2d 971, 987 (2nd Cir. 1974), cert. denied, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975), the court stated "[t]he government cannot argue that the courts must take a broad view of the scope of a conspiracy for the purpose of [*Kotteakos v. United States*] and a narrow view of the offense for the purpose of answering the ultimate question in this double jeopardy claim." 503 F.2d at 984-985.

An indictment for conspiracy to distribute drugs should allege the time frame during which the conspiracy was operative. *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir. 1981).

In *United States v. Martinez*, 562 F.2d 633 (10th Cir. 1977), the defendant was convicted for being in a marijuana dealing conspiracy in Texas in December, 1973. 562 F.2d at 634. He was later convicted of a second marijuana dealing conspiracy spanning the years from November, 1973 to January, 1977 in Oklahoma, Texas, West Virginia, Tennessee, and elsewhere. *Id.* at 635. Martinez challenged the second conviction on double jeopardy grounds, asserting that the Texas conspiracy was "but a slice of the larger conspiracy" in the Oklahoma indictment. *Id.* at 635. In

upholding the trial court's finding of two conspiracies, not one, the court stated:

> In *Bartlett*, the defendant was the master figure in both conspiracies and a defendant Edwards was a lesser figure in both, but the court concluded that separate agreements were involved, and that while one conspiracy might have been entered into for the transactions in both, this was not proven. . . . Where various parties conspire with one common conspirator, the evidence may nevertheless show that separate conspiracies were involved and that no one combination embraced the objectives of the others. . . . The mere fact that the same parties are charged with being members of two conspiracies, and that both conspiracies concerned transactions in the same items and overlapped in time, does not establish that the two conspiracies are the same.

562 F.2d at 638. The factors relied upon in *Martinez*, supra, thoroughly support the courts' conclusions in this case and in *Cruz* that the facts demonstrated that the conspiracies proven as to Cruz and Lopez were separate from the ones charged in the indictment, and not one overall conspiracy. In all fairness and equity, there should be no greater tolerance of a court's finding of separate agreements in a double jeopardy context than there should be in cases like this one and *Cruz*.

In *United States v. Lurz*, 666 F.2d 69 (4th Cir. 1981), the court recognized that the issue of whether there are two conspiracies or one is factual issue, and where the facts differ, so may the conclusion. 666 F.2d at 74. *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978) suggested the focus in this inquiry looks to the time frames, the persons acting as co-conspirators, the statutory offenses,

and "any other description of the offense charged which indicates the nature of scope of the activity which the government sought to punish." 578 F.2d 151. Certainly, in this case, the government should be held to its description of the offense which refuted any suggestion that it was charging Lopez as having been a post-seizure recruit and stated the charge was one of being a member of a conspiracy that led up to the seizure. In fact, the government's statements to that effect can be properly viewed as a binding judicial admission. *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (attorney's statement in oral argument, in trial and appellate courts, is a binding judicial admission).

All of the well-established case law cited above in this section amply supports the lower court's finding that the sole conspiracy charged in the indictment, which was certainly viewed by the participants (as discussed in *Broce*, supra) as one not charging "a new conspiracy subsequent to the seizure of the drugs" because Lopez and Jiminez "were clearly members prior to that seizure" (Res. App. 21a), was not born out by the evidence in the case. Just like *Cruz*, the holding is based upon application of sound law to a routine review of the sufficiency of the evidence. The conclusion below should be affirmed. Regardless of *Cruz*, this case was correctly decided because the indictment and the government's stated view thereof limited the charged conspiracy to pre-seizure involvement, and the court of appeals concluded there was insufficient evidence to support the charged conspiracy.

D. Neither *Cruz* Nor This Case Creates Any New Hardship Or Difficulties For Law Enforcement Or Prosecution

Courts have long recognized that prosecution of conspiracy cases is without doubt a "heavy burden on the prosecution." *Krulewitch v. United States*, supra, 336 U.S. at 453 (Jackson, J., concurring). Charging decision, especially ones requiring a determination of whether a single or separate conspiracies are shown, "requires the government to make delicate judgments." *United States v. Ingman*, 541 F.2d 1329 (9th Cir. 1976). Not only are conspiracy prosecutions complex because the facts in the case are usually complex, but the law of conspiracy is equally so. One noted commentator, Professor Paul Marcus, prefaced his book on the subject of conspiracy cases by noting that his research and preparation of the book "lead me into a complex world of substantive criminal law, criminal procedure, and very difficult practical questions." P. Marcus, *The Prosecution and Defense of Criminal Conspiracy Cases*, v. (1988).

The government was put on clear notice in 1946, fifty-six years ago, of the detrimental consequences that may stem from hasty charging decisions in a conspiracy case, if their proof at trial does not comport with the conspiracy charged in the indictment. *Kotteakos v. United States*, supra. The Court recognized that the decision would be inconvenient for the prosecution, but cautioned that our "Government is not one of mere convenience or efficiency." 328 U.S. at 773. Much of the consternation expressed in the dissenting opinions in this case revolves around the distaste associated with the reversal of the conviction on the charged conspiracy despite the fact the evidence showed involvement in a criminal conspiracy of like kind.

However, that position was recognized, and rejected, long ago.

Neither *Cruz* nor this case creates any additional burdens or obstacles to hinder the government's ability to bring wrongdoers to justice. First of all, Billy Cruz stands convicted of the substantive offense which he committed, attempted possession of a controlled substance with intent to deliver. 127 F.3d at 797. No legal barriers were constructed by the Court of Appeals decision in this case that prevent a substantive charge against Lopez. Justice Jackson expressed the sentiment in *Krulewitch v. United States*, that "where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade . . . it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law." 336 U.S. at 449 (Jackson, J., concurring).

Second, under *Cruz* and this case, the government certainly can bring a conspiracy charged against each conspirator so long as the charge reflects the conspiracy shown by the facts. In this case, it is abundantly clear that the trial and appellate court gave the government every opportunity to demonstrate that it had the necessary proof to support its theory of the Lopez' conspiratorial act, which was that he joined in a criminal conspiracy prior to November 18, wherein he reached "an association and agreement among these . . . individuals [Sotello and Recio] and Mr. Arce and others to bring narcotics from the southern part of the United States up to Idaho." The court also allowed the government to present a second theory of conspiracy which had no time constraints, which was allegedly ongoing after November 18. The Court of Appeals

considered all the evidence and concluded that the government had not proven either charge.

Nothing in the opinion can properly be said to create a windfall for conspirators. The government's intervention will not prevent prosecution for those who in fact joined the conspiracy beforehand. It will not prevent prosecution for those who join a conspiracy afterwards. *Cruz* and this case recognize that separateness of a conspiracy, or agreement, reached after and only because the government foiled the first agreement. They are not the first cases to do so. They did not rule that the same results should apply as a matter of law in other cases. They made decisions based upon the specific facts of the case and the specific charge contained in the indictment. Courts have recognized that in determining whether one or two separate conspiracies is shown, the factual inquiry includes the relative time frame, especially where intervening factors are present which make it clear that one conspiracy ended before another one began. *United States v. Mallah*, 503 F.2d 971, 986 (2d Cir. 1974).

In this case, the government, for lack of a better term, stumbled upon a load of drugs being transported in Nevada. There had been no on-going investigation. Not being satisfied with the arrest of two men, they decided to stage a delivery of the drugs to in an effort to catch the one(s) expecting them. When that attempt failed, they persuaded one of the arrested suspects to make a phone call to lure someone in to pick up the lost truck and its contents. The government at this stage was proceeding with an expanded "sting" and doing so in complete reliance upon the word of an arrested suspect, one who indicated his part in the conspiracy was to assist in transport of the one load, nothing before, nothing after. It seems clearly foreseeable

that the efforts to draw in suspects to get the truck might get persons who had been involved all along, or might get a new participant with no prior knowledge. If the government was to place Lopez on trial for conspiracy, it has the obligation to correctly define the parameters of that alleged conspiracy in the indictment. The government steadfastly maintained that it would prove Lopez was part of the conspiracy that led up to the seizure of the drugs. It specifically rejected the idea that the conspiracy charge was for any agreement he made after Arce made his call to pass on the message that the transport had failed. The government should not cry foul with the Court of Appeals for holding them to that burden.

In *Krulewitch*, supra, Justice Jackson correctly pointed out that it is for the prosecutors, not the courts, to determine when to use a "scatter gun" to bring down the defendant, but "there are procedural advantages from using it which add to the danger of unguarded extension of the concept." 336 U.S. at 452. He warned that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Id.* at 449. Respondent urges this Court to decline Petitioner's request to extend the doctrine of conspiracy to meet the exigencies of this particular case by finding a proper conviction in spite of the fact that the government did not prove what it stated it would prove in terms of Lopez involvement with the conspiracy charged in the indictment.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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August 2002

APPENDIX A

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ, ADRIAN LOPEZ, Defendants.	Criminal No. 97-102-S-BLW RESPONSE BY UNITED STATES TO DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL

The United States of America and Betty H. Richardson, United States Attorney for the District of Idaho, through Kim R. Lindquist, Assistant United States Attorney, respond to the above-referenced motion as follows:

Each defendant moves for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. Rule 29 reads in pertinent part:

(a) . . . Motions for directed verdict as abolished and motions for judgment of acquittal shall be

used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

* * *

(b) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within seven days after the jury is discharge. . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. . . .

In evaluating a Rule 29 motion, the court must review the evidence in the light most favorable to the government and decide whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Riggins*, 40 F.3rd 1055, 1057 (9th Cir. 1994).

Defendants Lopez and Jiminez rely on the case of *United States v. Cruz*, 127 F.3rd 791 (9th Cir. 1994).

Defendants Lopez and Jiminez rely on the case of *United States v. Cruz*, 127 F.3rd 791 (9th Cir. 1997), in arguing that the respective involvement of the two defendants was subsequent to the arrest of co-defendants Sotelo and Arce and the seizure of the cocaine and marijuana in Nevada, and that such seizure constituted the defeat of the object of the conspiracy, thereby precluding sufficient

evidence for a rational jury to have found beyond a reasonable doubt that the conspiracy was still in existence at the time of their involvement.[1]

The *Cruz* case is distinguishable from the case at bar. In *Cruz*, the appellate court found that, as to the appellant, the conspiracy ended by virtue of the defeat of its object in the form of the confiscation of the drugs *before* the appellant became involved in the drug-related activities. Indeed, the evidence showed and the Government conceded that the appellant was initially recruited by a co-defendant *after* the arrest of the co-defendant and the seizure of the drugs in the latter's possession. In holding that the conspiracy terminated before appellant became involved, the appellate court also rejected the Government's argument that appellant's payment constituted the anticipated "last act" of the ongoing conspiracy. In distinguishing the case of *United States v. Mason*, 658 F.2d 1263, 1269-70 (9th Cir. 1981), cited by the Government, the appellate court pointed out that *Mason* "involved[d] statements by a conspirator . . . made after the arrest of other members of the conspiracy, not the liability of a person **recruited after** the arrest had occurred . . . ." The evidentiary context in *Mason* was statements made by one conspirator after another conspirator had been arrested, but with the prior involvement of the former clearly substantiated by the evidence. To this end, the appellate court declared that "it is more reasonable to characterize

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[1] Although citing the *Cruz* case in his motion document, at the time of the United States' response no supporting memorandum had been filed by Defendant Jiminez.

[appellant's] behavior as part of a new conspiracy ., . ., rather than part of the original conspiracy." *Cruz* at 795.

The case at bar is different. As to Defendants Jiminez and Lopez, the arrest of Sotelo and Arce and the seizure of the narcotics in Nevada did not terminate the conspiracy or defeat the object of that conspiracy as fare as they were concerned, by virtue of their prior involvement. Indeed, their activities after the arrest and confiscation were merely a manifestation of that prior involvement. In this regard, the telephone call by Arce was not that of "recruitment," but one of notice of the load arrival in a pre-existing and ongoing conspiracy as far as they knew and were concerned. All of the evidence admitted as to Defendants Jiminez and Lopez, from the pre-Sotelo/Arce arrest telephone calls to the events immediately associated with their picking up the "sting" loan of narcotics manifested prior involvement. Indeed, there was no evidence presented by the defense or the United States that suggested exclusive post-drug seizure recruitment. When Arce made the delivery notice telephone call, he did so as a co-conspirator to other co-conspirators, with yet other co-conspirators responding to pick up the load, namely, Defendants Jiminez and Arce.

Moreover, the "last act" theory espoused by the *Mason* case and rejected by the *Cruz* court is applicable here. Although *Mason* involved statements by a conspirator made after the arrest of other members of the conspiracy, the activities and statements by Jiminez and Lopez in this case are analogous to the post-seizure statements of *Mason*. Indeed, as substantiated by the evidence, at the time Jiminez and Lopez acted, including making statements upon their arrest, they were clearly already involved

in the conspiracy. There was no evidence to the contrary beyond potential arguments of counsel.

With this, the evidence was more than sufficient for any rational jury to have found beyond a reasonable doubt that the conspiracy was still in existence at the time Jiminez and Lopez were shown to be involved.

Defendant Lopez, also citing *Cruz*, argues further that he should be acquitted of the possession with intent to distribute count by virtue of the *Pinkerton* charge and that he is not liable for any underlying substantive offense committed by Sotelo and Arce because he was not a member of that conspiracy.

Once again, the evidence elicited at trial, especially taken in the light more favorable to the United States, shows that he was a member of that conspiracy and properly subject of the *Pinkerton* charge. Moreover, that same evidence showed Defendant Jiminez to personally be in possession of the narcotics with the intent to distribute the same, independent of the any *Pinkerton* ties to a conspiracy.

Defendant Sotelo seems to argue simply that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Sotelo first and misleadingly cites the case of *United States v. Baron*, 94 F.3rd 1312 (9th Cir. 1996), for the proposition that, by virtue of the Defendant's arguable ignorance of the hidden drugs, "the jury may have convicted Baron without finding the necessary *mens rea* . . . [.]"

Beyond the factual similarity associated with the vehicle stop, the two cases are divergent. From a legal

standpoint, the *Baron* conviction was reversed because a *Jewell* instruction was given the jury absent a sufficient factual showing of proof of deliberate avoidance, thereby leaving the jury to impermissibly infer guilty knowledge on the basis of mere negligence without such proof of deliberate avoidance. In so holding, the *Baron* court emphasized that the *Jewell* instruction "should not be given when the evidence is that the defendant had **either actual knowledge or no knowledge at all** of the facts in question." Citing *United States v. Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991). Not only did the *Baron* facts fail to show the requisite proof of deliberate avoidance, they actually suggested actual knowledge of the drug contents of the car, thereby further precluding the giving of the *Jewell* instruction. It was within this context, in specifically determining whether the court should exercise its discretionary authority to reverse the conviction, that the appellate tribunal declared that the jury might "have convicted Baron with finding the necessary *mens rea* required under 21 U.S.C. § 841(a)(1)." That is, without the requisite evidence of deliberate avoidance in order to substantiate the *Jewell* instruction, the jury might impermissibly have inferred guilty knowledge on the basis of mere negligence without such proof.

In the case at bar, no *Jewell* instruction was given because **factually** there was no proof of deliberate avoidance **and** there was substantial evidence of actual knowledge. Indeed, the evidence of actual knowledge was overwhelming, from the facts associated with the transportation and stop of the narcotics-laden truck, to the story given the police by Sotelo, to the telephone activity by Sotelo, to the detailed testimony of co-defendant Arce as to Sotelo's involvement. Thus, the *Baron* case is not only

inapplicable as asserted by Sotelo but, indeed, substantiates the verdict in the case at bar.

The foregoing takes us to Sotelo's second emphasis, namely, the isolation of various facts elicited at trial and their characterization as innocent as standing alone. In essence, Sotelo makes a closing argument under the guise of Rule 29(c). However, when all of the evidence is taken as a whole, the proof against Mr. Sotelo was overwhelming. Accordingly, the Rule 29 Motion by Sotelo at the end of the Government's case-in-chief was denied by the trial court, and the jury agreed, as proclaimed by its verdict.

Finally, Sotelo declares that he was convicted as a result of bias and prejudice unrelated to his proved activities. Indeed, in his memorandum his attorney states:

> Bias and prejudice have been the scourge of the legal system and should be fought against in every case in which it [sic] may exist, regardless of the gravity of the offense. To fight bias requires both an immense intellectual effort and a courageous stand. In this case, the only evidence tying Sotelo to the crimes alleged was that he was driving a truck carrying hidden drugs. . . .

To the foregoing, it can only be said that Mr. Sotelo was convicted by a reasonable and rational jury with evidence overwhelming as to his guilt. Moreover, it must be stated that some individuals are so preoccupied and concerned with possible bias and prejudice, in whatever form, that they fail or refuse to properly perceive reality; that is, they suffer from their own distinct form of bias and prejudice. In their case, too, an immense intellectual effort and a courageous stand are required to fight the same.

Accordingly, the respective motions should be denied.

Dated this 7th day of April, 1998.

BETTY H. RICHARDSON
United States Attorney

/s/ Kim R. Lindquist
Kim R. Lindquist
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee in the office of the United States Attorney; that a true and correct copy of the foregoing Response by United States to Defendants' Motions for Judgment of Acquittal was faxed, hand delivered or mailed by United States mail, postage prepaid, this 7th day of April, 1998, to the persons whose names are listed below.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FRANCISCO JIMENEZ RECIO
AND ADRIAN LOPEZ-MEZA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae of the American Center for Law and Justice and Hons. Walter B. Jones, Jim Ryun, and J.C. Watts Jr. Supporting Petitioner

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. As a public interest law firm the ACLJ is dedicated to the concept that freedom and democracy are God given inalienable rights that must be protected both domestically and internationally.

ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States and lower federal courts, and Chief Counsel Jay Alan Sekulow has presented oral argument before this Court in eight cases.

As a public interest law firm devoted to the defense of constitutional liberties, the ACLJ has vital interest in the preservation of our constitutional system. Terrorism represents a real and present threat to that system. Reversing the Ninth Circuit's decision in *Recio* will remove a substantial impediment to the fight against terrorism while posing little or no danger to the legitimate rights of Americans.

This brief is filed on behalf of Representatives Walter B. Jones, Jim Ryun, and J.C. Watts Jr., all of whom are members of the United States House of Representatives. Each of these amici currently serves in the One Hundred Seventh Congress. These Representatives disagree with the

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* This brief is filed with the consent of the parties and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

Ninth Circuit's decision in *United States v. Recio* and desire the Supreme Court to reverse this decision, thus upholding the long line of Supreme Court precedent in the area of conspiracy law. Because of the current climate that exists in the United States as a result of the terrorist attacks on September 11, 2001, it is more important than ever that the legislative and executive branches have the tools needed to stop and prosecute conspirators who would seek to attack Americans both at home and abroad.

The amici Representatives have dedicated time and effort to defending and protecting Americans in the wake of September 11th. It is this commitment to America's safety and security that compels them to support the reversal of the Ninth Circuit's decision in *United States v. Recio*. Amici take the position that the decision below hamstrings law enforcement officials in their efforts to fight terrorism. Terrorism, like the war on drugs, requires covert operations that are vital to frustrating and preventing the actual crime. After September 11th it is abundantly clear that such atrocities must be stopped. It is also clear that the masterminds of such evils must be prosecuted and if convicted jailed, thus preventing their involvement in future terrorist acts. They must not be allowed to simply walk away from justice due to the success of the government at foiling their planned operation. This is exactly what would happen if the decision below is allowed to stand. Amici, therefore, urge this Court to reverse the erroneous decision of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

The decision below finds no support in the law of conspiracy and effectively hamstrings law enforcement officials in their efforts to purge the societal evil of drug trafficking; however, the decision has far more serious

implications. The question of whether a conspiracy ends as a matter of law when the government frustrates its objective will determine the government's ability to combat a far more pernicious and immediate threat facing our nation – that of terrorism. The *Recio* decision substantially impedes law enforcement efforts in the fight against terrorism, where, like the war on drugs, covert operations are vital to frustrating and preventing a planned terrorist offensive as well as prosecuting the conspirators.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION DEPARTS FROM LONG ESTABLISHED PRINCIPLES OF CONSPIRACY LAW.

In *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit reversed the conspiracy convictions of two men arrested in a sting operation that caught them transporting approximately $12 million worth of cocaine and marijuana. Despite overwhelming evidence of their agreement to transport the drugs and their commission of acts in furtherance of that agreement, the court concluded that there was insufficient evidence linking the men to the conspiracy before the government had intervened and frustrated its objective. The court adopted the rule that when a conspiracy's objectives have become factually impossible – such as when the government intervenes – the conspiracy necessarily ends. *Id.* at 1071-72. This approach taken by the Ninth Circuit conflicts with the black letter conspiracy law set forth by this Court as well as other courts.

A. Conspiracy is a Distinct Crime and May be Punished Whether or Not Its Objective Is Actually Achieved.

The Ninth Circuit's arbitrary limitation on the duration of a conspiracy is unprecedented. It is a fundamental principle of conspiracy law that the duration of a conspiracy is determined by "the scope of the conspiratorial agreement," not by whether the ultimate objective is achieved. *Grunewald v. United States*, 353 U.S. 391, 397 (1957). As this Court has explained, liability for conspiracy even though the ultimate goal has been frustrated is justified because "the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

Recent discussion in legal periodicals has also emphasized this principle:

> [I]f the act of conspiring leads people moderately disposed toward criminal behavior to be more than moderately disposed, precisely because they are conspiring together, it makes sense, on grounds of deterrence, to impose independent penalties. . . . The key point is that the act of conspiracy has an independent effect, that of moving people in more extreme directions. The point holds for terrorists as well as for everyone else.

Sunstein, *Why they Hate Us: The Role of Social Dynamics*, 25 Harv. J.L. & Pub. Pol'y 429 (Spring 2002) (internal citations and quotation marks omitted).

This Court has described the crime of conspiracy as "an offense of the gravest character":

> It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

United States v. Rabinowich, 238 U.S. 78, 88 (1915). As such, the criminal agreement itself is the *actus reus*. The common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U.S. 373, 378 (1913). *See also Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act") (citations omitted). Thus, the crime of conspiracy is complete whether or not the substantive crime which was its object was committed. *See United States v. Feola*, 420 U.S. 671, 694 (1975) (concluding that conspiracy law permits conviction for agreement and overt act, regardless of whether the crime agreed upon is actually committed); *United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("The impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself").

The rule applied by the Ninth Circuit conflicts with the decisions of other federal circuits and state supreme courts rejecting factual impossibility as a defense to conspiracy. *See, e.g., United States v. Hsu*, 155 F.3d 189, 203 (3d. Cir. 1998) (impossibility is not a defense to conspiracy); *United States v. Sobrilski*, 127 F.3d 669, 674-75 (8th Cir. 1997), (same) cert. denied, 522 U.S. 1134, 1152

(1998); *United States v. Belardo-Quinones*, 71 F.3d 941, 944 (1st Cir. 1995) (conspiracy may exist even if the object of the conspiracy cannot be achieved); *United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir. 1994) (factual impossibility is not a defense to conspiracy); *State v. Houchin*, 765 P.2d 178, 179-80 (Mont. 1988) (factual impossibility, which exists "when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators," is not a defense to conspiracy charge); *State v. Moretti*, 244 A.2d 499, 503-04 (N.J. 1968) ("We hold that when the consequences sought by a defendant are forbidden by the law as criminal, it is no defense that the defendant could not succeed in reaching his goal because of circumstances unknown to him"), cert. denied, 393 U.S. 952 (1968).

B. The Decision Below Greatly Overstates the Government's Burden of Proof.

The crime of conspiracy in this case consists of two elements: (1) an agreement to possess with intent to distribute narcotics; and (2) knowledge of the agreement's objectives and an intent to further them.[1] The prosecution must prove each of these elements beyond a reasonable doubt; however, this Court has recognized that because secrecy and concealment are essential features of any

[1] A charge of general criminal conspiracy under federal law consists of four elements: (1) an agreement between at least two parties, (2) to commit an unlawful act, (3) where the parties knew of the conspiracy and voluntarily participated in the conspiracy, and (4) where at least one conspirator committed an overt act in furtherance of the conspiracy. 18 U.S.C. § 371 (1994); *See also* 18 U.S.C. §2332(b)(2000) (setting out requirements for conspiracy to commit terrorism). In narcotics conspiracies, the government's burden is lessened in that it need not prove the commission of any overt acts in furtherance of the conspiracy. *See United States v. Shabani*, 513 U.S. 10, 16 (1994); 21 U.S.C. § 846.

successful conspiracy, the government need not prove that a defendant had intimate knowledge of the conspiracy's details:

> [T]he law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and [the conspirators'] connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Blumenthal v. United States, 332 U.S. 539, 557 (1947).

It is well established that circumstantial evidence alone is a sufficient basis for a conspiracy conviction. *United States v. Agofsky*, 20 F.3d 866, 870 (8th Cir. 1994) (holding that a conspiracy can be inferred from circumstantial evidence due to the secretive nature of conspiracies). For example, it is not necessary for the government to prove a formal agreement; instead, the agreement required to sustain a conspiracy conviction can be inferred from the defendant's actions. See, e.g., *Hamling v. United States*, 418 U.S. 87, 124 (1974). Likewise, acts committed in furtherance of the conspiracy are often enough to show that the conspirator was a knowing participant. See *United States v. Cassiere*, 4 F.3d 1006, 1015 (1st Cir. 1993).

A federal district court evaluating a motion for a bill of particulars made in the case against Osama bin Laden elaborated on the government's burden of proof:

> The existence of a conspiracy and a defendant's participation therein is usually established by circumstantial evidence based upon independent proof of each alleged co-conspirator's acts, conduct and statements and the totality of conduct of all the participants and the reasonable inferences to be drawn therefrom.

United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) (internal citations and quotation marks omitted). The court explained, therefore, that the government is not required to prove "exactly when or how a conspiracy was formed or when a particular defendant joined the scheme . . . ." *Id.* at 242.

This is significant because it is not uncommon for a member of a conspiracy, either drug or terrorist, to have limited information, pertaining primarily to his specific role.[2] The law does not permit this to limit his culpability: "Once a conspiracy exists, evidence establishing beyond a reasonable doubt defendant's connection with the conspiracy, even though the connection is slight, is sufficient to convict defendant of knowing participation in the conspiracy." *United States v. Bautista-Avila*, 6 F.3d 1360, 1362 (9th Cir. 1993) (citations and quotation marks omitted).

As will be discussed in section II.A., the court below, because of its holding that the charged conspiracy ended

[2] For example, Osama bin Laden claimed in a widely broadcast videotape that some of the September 11 hijackers did not know of their group's ultimate plan until the very end. Brooke A. Masters, *High Price of Opening A Window on Terror; Man Faces Deportation After Sept. 11 Testimony*, The Washington Post, May 5, 2002, at A1. Conspiracy law does not permit this fact to mitigate against finding their involvement in the broader conspiracy.

when its purpose was thwarted, virtually ignored overwhelming evidence, albeit circumstantial, of respondent's knowing participation in the conspiracy. In doing so, the court ignored its obligation to review the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999). Essentially, the court invaded the jury's province by going beyond questioning the sufficiency of the evidence and effectively arguing the weight of the evidence.

II. PERMITTING THE DEFENSE OF IMPOSSIBILITY IN CONSPIRACY LAW PLACES UNACCEPTABLE OBSTACLES IN THE WAY OF LAW ENFORCEMENT OFFICIALS ENGAGED IN THE WAR ON TERROR.

The effect of *Recio* is to exclude relevant, probative evidence of guilt following successful and legitimate intervention by law enforcement, thereby handicapping the prosecution of conspiracy cases and exonerating culpable defendants. Due to the shared characteristics of drug organizations and terrorist networks, this precedent will adversely impact the prosecution of terrorist conspiracies in a similar manner. Consequently, the more imminent practical effect of the decision below is to subconsciously focus law enforcement officials not on stopping crime and catching criminals, but ensuring that their evidentiary backsides are sufficiently covered before they intervene in criminal activity.

A. The Decision Below Requires the Exclusion of Relevant, Probative Evidence and Exonerates Culpable Defendants.

Respondents would have the Court believe that the Ninth Circuit's opinion merely prevents law enforcement officials from stopping criminal activity, luring people into becoming involved through the use of informants, and then charging them with conspiracy. In truth, the *Recio* decision is far broader, diminishing or eliminating altogether the evidentiary value of vital undercover investigations and operations aimed at thwarting conspiracies. Judge O'Scannlain, in his dissent from the Ninth Circuit's denial of rehearing en banc, characterized the panel decision as constituting "a de facto evidentiary exclusionary rule" with one important distinction:

> Unlike the exclusionary rule familiar from the Fourth and Fifth Amendment contexts, . . . the Cruz/Recio corollary is not triggered by, nor does it deter, wrongful conduct on the part of law enforcement officers. Indeed, the reverse is true: the paradoxical effect of Cruz and Recio is to exclude evidence of guilt following successful and entirely legitimate intervention by law enforcement agents.

United States v. Recio, 270 F.3d 845, 848 (9th Cir. 2001) (O'Scannlain, J., dissenting).

Moreover, any alleged concerns about improper law enforcement methods in "sting" operations are adequately provided for in the body of conspiracy law itself. For example, under federal conspiracy law it is impossible for an individual to conspire only with someone acting at the behest

of the government.[3] In other words, an individual who "conspires" to violate the law with only one other person who is a government agent or informant who secretly intends to frustrate the conspiracy fails to meet the formal requirements of conspiracy: "It is a well-established rule that there can be no indictable conspiracy involving only the defendant and government agents and informers." *United States v. Pinque*, 234 F.3d 374, 378 (8th Cir. 2000). The rationale behind this defense is that "[t]here is neither a true agreement nor a meeting of the minds when an individual 'conspires' to violate the law with only one other person and that person is a government agent." *See United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984).[4]

As explained in more detail below in section II.B.2., drug organizations and terrorist networks share a need for proven loyalty and trust among members that makes it unlikely that an outsider would be recruited at the last minute

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[3] Under some state law, an individual may be convicted of conspiracy regardless of the status or intent of his co-conspirator, even where the sole co-conspirator is actually a police officer. Likewise, under the unilateral approach of the Model Penal Code, "the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned." Secs. 5.03, cmt. 2(b) at .400 (1985).

[4] This defense, however, is subject to two important limitations. First, the rule that government agents do not count as co-conspirators is relevant only in situations where the conspiracy involves only one defendant and a government agent or informer. It is inapplicable in cases involving a bona fide co-conspirator. Therefore, while a government agent cannot be a co-conspirator, the involvement of a government agent in no way destroys a conspiracy in which at least two individuals have agreed to engage in criminal activity. *See United States v. Medina*, 32 F.3d 40, 44 (2d Cir. 1994). Secondly, this defense is limited in that a co-conspirator may under certain circumstances act as an informant without losing his status as a conspirator. *See United States v. DeSapio*, 435 F.2d 272, 281-83 (2d Cir. 1970) (As long as the informant acts on his own in the conspiracy and is not directed in his participation by the government, he does not become a government agent by merely providing information to the government.)

to carry out the most important part of the conspiracy. This fact too should allay concerns about police "sting" operations entrapping the innocent. Common sense and the nature of terrorist cells dictate the unlikelihood that a mission with so much at stake[5] would be entrusted to someone not already a part of the broader conspiracy.

In arriving at its decision, the court below summarily discounted a substantial amount of relevant, probative, legitimately obtained evidence of the respondents' involvement in the conspiracy. For example, prosecutors in *Recio* presented evidence of 1) respondents' use of prepaid calling cards to make telephone calls to the place the drugs were to be delivered; 2) respondents' possession of multiple pagers; 3) multiple receipts for expired non-owner insurance policies found in Recio's possession supporting the inference that he habitually drove drug trucks; 4) respondents' words and conduct upon arrest; and finally, 5) expert testimony demonstrating that "the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment." *United States v. Recio,* 258 F.3d at 1071-72. The court also disparaged expert testimony that "communication devices typically used by complex drug organizations are cell phones and pagers because the users of these devices can be physically located anywhere, untraceable by the authorities." *Id.* at 1080 (Gould, J., dissenting). This was testimony that a jury could have properly given weight. Given the similarities between drug and terrorist organizations and investigations, prosecutions

[5] Al-Qaeda's operations are meticulous, with some plans in the works for months if not years. The operations are also clever, and bin Laden himself is very much hands-on. For example, the 1993 World Trade Center bombers cased the twin towers multiple times, looking not just at security but the points under the trade center where an explosion could do the most damage. Similarly, the East Africa embassy bombers phoned in credible threats to the embassy and then observed the embassy response. *Osama Bin Laden: FAQ*, www.msnbc.com/news/627355.asp?cp1=1 (visited June 30, 2002).

of the latter will rely on the same genre of evidence. As the dissent pointed out, "[t]his case poses an important issue concerning the scope of reasonable inferences that may be drawn by a jury from evidence of criminal conspiracy." *Id.* at 1078 (Gould, J., dissenting).

Given that the communication methods of terrorist networks mirror those used by the drug conspirators in this case, the same type of evidence will be at risk under the precedent of *Recio*. It has been reported that Osama bin Laden stopped using satellite phones when he discovered that the United States was intercepting his communications off the Inmarsat-3 satellite over the Indian Ocean. *Osama Bin Laden: FAQ*, www.msnbc.com/news/627355.asp?cp1=1 (visited June 30, 2002). One of the biggest breaks in the embassy bombing investigation was interception of a congratulatory phone call in the days after the bombings. Bin Laden has also used faxes from remote locations and in some cases, Internet-based e-mail. In addition to encryption, al-Qaida has used various code words and aliases to disguise identities. *Id.* Other recently discovered terrorist plots, such as those of the "Shoe Bomber" and the "Dirty Bomber," will likely involve more of the same type of evidence due to the nature of the undercover operations that must be carried out in order to infiltrate these highly secretive networks.

The Ninth Circuit's ruling turns conspiracy law on its head and helps to exonerate culpable defendants based on nothing more than the government's choice of time to intervene in the conspiracy. According to *Recio's* logic, as long as a particular defendant's role in the conspiracy had not begun at the point in time that the government foiled the conspiracy's object, the government could not use the defendant's post-intervention acts to link him to that conspiracy. The *Recio* decision will therefore impede law enforcement efforts by making officials hesitant or

apprehensive about intervening in criminal activity for fear of compromising future prosecutions.

B. The Decision Below Will Impact the Prevention and Prosecution of Terrorist Conspiracies Like it Did the Drug Conspiracy But With Potentially Catastrophic Consequences.

Terrorist networks operate in substantially the same manner as complex drug organizations, but the war on terrorism is distinct in three important respects – its newness, its breadth, and, given recent efforts by terrorists to obtain nuclear, chemical, and biological capability, its much higher stakes. The similarities between terrorism and drug trafficking make the task before this Court straightforward; the differences between them make it monumental. The decision below must be reversed to ensure that justice can be done.

1. The Enemy in this War on Terrorism is Unlike Any the United States Has Faced in its History.

Al-Qaeda is believed to have operations in 60 countries and active cells in 20, including the United States. Bin Laden's assets include approximately $300 million in personal finances with which he funds a network of as many of 3,000 Islamic militants. *Osama Bin Laden: FAQ*, www.msnbc.com/news/627355.asp?cp1=1 (visited June 30, 2002). In a statement before Congressional Armed Services Committees, Deputy Secretary of Defense Wolfowitz described our adversaries:

> Our new adversaries may be, in some cases, more dangerous than those we faced in the past. . . . Their decision-making is not subject to the same constraints that earlier adversaries faced. [O]sama bin Laden, Saddam Hussein and Kim Jong Il answer to no one. They can use the capabilities at their disposal without consultation or constraint – and have demonstrated a willingness to do so.

www.defenselink.mil/speeches/2001/s20011003-depsecdef.html (visited on 4/9/02).[6]

Al-Qaeda's foot-soldiers demonstrate a comparable zeal. The suicidal nature of the September 11th attacks demonstrates the kamikaze philosophy that motivates them. Al-Qaeda members' commitment has been described as "unyielding": "They film their suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States."
www.latimes.com/news/nationworld/world/la-092401alqaeda.story (visited on 4/10/02).

The approach taken by terrorist leaders demonstrates how loyalty is cultivated among conspiracy members:

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[6] The "fatwa" or religious decree issued by bin Laden on Feb. 23, 1998 further illustrates the fanaticism of America's new enemy: "The ruling to kill the Americans and their allies — civilians and military — is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Asqua Mosque [in Jerusalem] and the holy mosque [in Mecca, Saudi Arabia] from their grip, and in order for their armies to move out of all lands of Islam, defeated and unable to threaten any Muslim."
www.msnbc.com/news/627355.asp?cp1=1 (visited on 6/30/02).

> They create enclaves of like-minded people. They stifle dissenting views and do not tolerate internal disagreement. They take steps to ensure a high degree of internal solidarity.
>
> . . . .
>
> The structure of Al Qaeda . . . appears to involve small groups of relatively young men who maintain strong bonds with each other, bonds whose intensity is dramatized and heightened by the secrecy demanded by their missions and the danger of their projects.

Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 Harv. J.L. & Pub. Pol'y 429 (Spring 2002) (internal citations and quotation marks omitted).

The terrorist network is well-funded even apart from the independent wealth of its leaders. In December, 2001, the Bush administration ordered the Department of the Treasury to freeze the assets of the Holy Land Foundation and other Muslim charitable organizations and banks used as fronts to finance the militant wing of the Palestinian group Hamas, described by President Bush as "one of the deadliest terror organizations in the world today." The Foundation has recently been linked to Jose Padilla, the suspected terrorist arrested in May 2002 for his role in a plot to detonate a radioactive "dirty bomb." Ken Thomas, *Suspect worshipped at mosque once linked to alleged terrorist financing,* The Associated Press State & Local Wire, June 13, 2002. On June 12, 2002, two Lebanese brothers were convicted of smuggling cigarettes from North Carolina, where cigarette taxes are low, to higher tax states for resale, and using the profit to finance the Middle East terrorist group Hezbollah.

To date, eight conspirators have pled guilty and two others have been found guilty. Dana Priest & Douglas Farah, *Al-Qaida and Hezbollah are teaming up officials say*, The Virginian Pilot, July 1, 2002, at A1, 11. One of the brothers even raised money for the group at weekly Muslim prayer meetings, and sent $3,500 to a Hezbollah military commander in 1999. Tim Whitmire, *Two Lebanese brothers found guilty in what prosecutors said was a milestone anti-terrorism case,* The Associated Press, June 22, 2002. United States Attorney Bob Conrad noted that "[t]he fact that there are terrorist fund-raising cells in Charlotte means there are terrorist fund-raising cells elsewhere." *Id.*

The White House has acknowledged that al-Qaeda's links are "amorphous": "[T]hat's one of the ways that terrorism has so successfully operated around the world. It's hard to tell where one group begins and another group ends." www.whitehouse.gov/news/releases/2001/09/20010918-5.html (visited on 4/9/02). In fact, there is recent evidence of increased cooperation between al-Qaeda and Hezbollah – unlikely allies given their history of conflict. Dana Priest & Douglas Farah, *Al-Qaida and Hezbollah are teaming up officials say,"* The Virginia Pilot, July 1, 2002, A1, 11. News of such concerted efforts makes the threat facing this nation all the more ominous.

2. The Manner in Which Terrorist Cells Operate Mirrors that of Large, Complex Drug Organizations Such as the One Involved in *Recio*.

Like drug trafficking organizations, terrorist networks are complex and covert and can only be infiltrated through undercover efforts to apprehend conspirators and, more importantly, to thwart their planned attacks. When

asked about the difficulties in gathering evidence against terrorists, White House Press Secretary, Ari Fleischer, replied: "I think it's always accurate to say that the war on terrorism is a shadowy one. Terrorists do operate in a shadowy way. And that's why the President, from the beginning, has recognized that this is, as he put it, the new war of the 21st century ...."
www.whitehouse.gov/news/releases/2001/09/20010919-7.html (visited on 4/9/02).

Asian Studies Center Director for the Heritage Foundation, Dr. Larry Wortzel, in a Terrorism Q & A, elaborated on how this new war will be different from those of the past:

> This is a war that will involve covert action by special operations forces (Rangers, Special Forces, Navy Seals), law enforcement organizations, the US intelligence community, the Treasury Department, and the State Department. Careful information and public diplomacy operations will be part of it. I do not expect to see large bodies of troops based in a foreign country as we did in the Gulf War. When the US can operate as part of a coalition, or bilaterally with a friend or ally, it should do so. But if the only way it can attack a terrorist organization is by acting unilaterally, even through clandestine means, it must do so.

www.heritage.org/shorts/20010928terrorism.html (visited 7/10/02).

One scholar has used social network analysis to "uncover network patterns that would reveal how terrorists

organize their covert activities." *See* Valdis E. Krebs, *Mapping Networks of Terrorist Cells,* www.orgnet.com/prevent.html (visited June 17, 2002). Social network analysis is commonly used in criminal conspiracy cases, both for the purpose of prevention and prosecution. Krebs emphasized the difficulty in discovering a network that "focuses on secrecy and stealth": "Conspirators don't form many new ties outside the network and often minimize the activation of existing ties inside the network." *Id.* He explained that they rarely interact with outside contacts in order to reduce visibility and the chance of leaks out of the network.

Krebs' writings stress the crucial role of surveillance in "uncloaking" a covert network. He explained that had authorities tracked the two suspected al-Qaeda operatives known prior to September 11, they might have gathered enough information to cripple the mission. Once suspects are identified, Krebs explains, their daily activities, their interactions, visitors, conversations, travel, finances and so on, will start to reveal the network the suspects are embedded in. To act too quickly, to deport them immediately for example, would eliminate a known link and the ability to discover more of the network. *See* Valdis E. Krebs, *Can Large-Scale Terrorist Attacks Be Prevented?* www.orgnet.com/prevent.html (visited June 17, 2002).

Authorities have learned that Osama bin Laden organizes his terrorists into "cells" for the purpose of evading detection and infiltration. The basic principle behind cell organization is simple: By dividing the greater organization into many multiperson groups and compartmentalizing information inside each cell as needed, the greater organization is more likely to survive if one of its components is compromised. Dahlia Lithwick, *How Do Terrorist "Cells" Work?* September 17, 2001,

http://slate.msn.com/?id=1008311 (visited June 20, 2002). For example, had U.S. intelligence infiltrated one of the terrorist cells responsible for the September 11th attacks, they might have learned only of the proposed date of an attack but not the target, the time, or the means of the attack. The cells are structured according to their purpose:

> "Planning" or "support" cells may have fewer than 10 members, often local residents from Islamic nations, responsible primarily for fund raising. They may also be responsible for providing execution cells with drivers' licenses, cash, credit cards, or lodging, as well as procuring materials for bomb building. The members of "sleeper" or "submarine" cells may have lived in the target country for years, doing nothing until activated. According to one of Bin Laden's former aides, there are hundreds of "sleeper" terrorists across the United States. This is why several suspects from [September 11th's] attacks had no prior FBI record. "Execution cells" are brought in at the final stages of an attack. They will utilize resources supplied by other cells. Several of the hijackers from [September 11th's] attack arrived in the United States in August. "Operation commanders" may come in only at the last moment before the attack. They may be the only link between local cells and the larger umbrella organization--in this case, the central Bin Laden organization. The commander may not even perform the operation himself, often leaving the country before the terrorist attack occurs. Terrorism experts are certain a commander watched [September 11th's] attack and has escaped with the help of other U.S. cells. The commanders of both the first World Trade Center bombing in 1993 and the bombing of the U.S. embassy in Kenya are college graduates, multilingual, computer literate, and still at large.

Id.[7]

The character of these cells illustrates the vital role of covert operations in preventing terrorist attacks and the indispensable value of circumstantial evidence in prosecuting conspirators. Ideally, the government will "uncloak" the network before the planned offensive and intervene in time to thwart it; however, the decision below begs the question whether those who had not yet begun their role in the conspiracy can be brought to justice. This Court's resolution of that question will ultimately determine what

[7] Each operation has a planning cell and an execution cell, with the execution cell arriving on the scene in some cases only weeks before the attack is carried out. In most cases, like the 1993 World Trade Center bombing and the embassy bombings, an outsider recruits local country nationals to operate as a cell. Cells rarely number more than 10 people. In rare cases are the bombers — either the planners or the operators — older than 30. At the time of the 1992 bombings, the masterminds were both 25. Plans are made in one location then the bomb is made in another. In the 1993 World Trade Center bombing, the planning took place in a Jersey City, N.J., apartment, the materials were stored in a self-storage facility, and the bomb was put together in a garage. Similarly in Nairobi, the planning was done at a run-down hotel in downtown, while the bomb was put together in a suburban villa.

Officials report seeing repeated instances in which operatives encounter something unexpected, they will "go back to square one" out of fear that operational security has been breached. There is little autonomy, little spontaneity in operational matters, and changes in plans must be approved at higher levels. The cell leader on the scene can call off an operation without consulting anyone higher, said a senior intelligence official. Said one counter-terror official: "They have one idea ... alter it for them, then they go back to the drawing board. They are not agile. They have to reload, and that takes months ... about four to six months." "They are very willing to trade time for operational security." *Osama Bin Laden: FAQ*, http://www.msnbc.com/news/627355.asp?cp1=1.

means of surveillance and other covert activity, including "sting" operations, are available to law enforcement officials in their dual effort to prevent and prosecute terrorists.

CONCLUSION

Our nation currently faces a threat without historical precedent – an enemy who will readily commit the most horrendous acts against innocent civilians. Given the unique nature of this war on terrorism, this Court should proceed cautiously. The similarities between drug organizations and terrorist networks discussed above will require prosecutors to rely on precisely the same types of evidence held insufficient by the court below in order to successfully prove a terrorist conspiracy. Success in the war on terror demands that law enforcement be free to use all appropriate means to uncover planned attacks against the United States and that prosecutors be able to punish conspiracies whether or not the intended crime ensues.

For the foregoing reasons, and those expressed in Petitioner's brief, this Court should reverse the judgment below.

Respectfully submitted,

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